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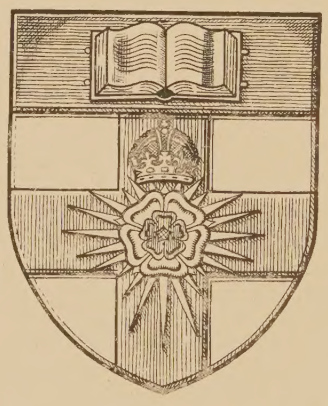

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CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

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Page	*Line*	*For*	*Read*
49	10	15	85
504	—3	LV	LIX
513	3	twenty	twelve

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1883, will be as follows:—

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Acton Local Board, Attorney-General *v.*	221
Aitken, Andrew *v.*	218
Allen, Croggan *v.*	101
Allnutt, *In re.* Pott *v.* Brassey	275
Andrew *v.* Aitken	218
Attorney-General *v.* Acton Local Board	221
——— *v.* Gaskill	537

B.

	PAGE
Bath, *Ex parte. In re* Phillips	450
Beazley *v.* Soares	660
Beeson, Dawson *v.*	504
Bennett, Donnell *v.*	835
Berry, *In re. Ex parte* Wilkinson	788
Biggs *v.* Peacock	284
Birch *v.* Mather	629
Birt, *In re.* Birt *v.* Burt	604
——— *v.* Burt. *In re* Birt	604
Blackburn Building Society *v.* Cunliffe Brooks & Co.	61
Blake *v.* Gale. *In re* Gale	820
Blick, Worcester City and County Banking Company *v.* *In re* Pumfrey	255
Boddington, *In re.* Boddington *v.* Clariat	597
——— *v.* Clariat. *In re* Boddington	597
Brassey, Pott *v.* *In re* Allnutt	275
Brewer *v.* Broadwood	105
Briscó, Williams *v.*	441
Broadwood, Brewer *v.*	105
Buckley's Trusts, *In re*	583
Bullmore *v.* Wynter	619
Bunkell, Walker *v.*	722

PAGE

Burt, Birt *v.* *In re* Birt – – 604
Bushell, *In re.* *Ex parte* Great Western Railway Company – 470

C.

Cattley, Mason *v.* *In re* Mason 609
Clariat, Boddington *v.* *In re* Boddington – – – 597
Clark, France *v.* – – – 830
Combe *v.* De la Bere – – 316
Croggan *v.* Allen – – – 101
Cunliffe, Brooks & Co., Blackburn Building Society *v.* – 61

D.

Davis *v.* Harford – – – 128
Dawson *v.* Beeson – – – 504
De Coulon, Wilson *v.* – – 841
De Geer *v.* Stone – – – 243
De la Bere, Combe *v.* – – 316
Devala Provident Gold Mining Company, *In re* – – – 593
Donnell *v.* Bennett – – – 835
Dyke (Sir W. H.), *Ex parte.* *In re* Morrish – – – – 410

E.

Eager, *In re.* Eager *v.* Johnstone 86
——— *v.* Johnstone. *In re* Eager 86
East and West India Dock Company *v.* Hill – – – 14
Eaton *v.* Storer – – – 91
Elliott *v.* Smith – – – 236
Evens, Nichols *v.* – – – 611

F.

Fearnside *v.* Flint – – – 579
Featherstone's Trusts, *In re* – 111
Fisher, Lees *v.* – – – 283
Flint, Fearnside *v.* – – – 579
Foster, *Ex parte.* *In re* Foster 797
———, Greene *v.* – – – 566
France *v.* Clark – – – 830
Francis *v.* Hayward – – 177
Fraser, *In re.* Yeates *v.* Fraser 827
———, Yeates *v.* *In re* Fraser 827

PAGE

Freer, *In re.* Freer *v.* Freer – 622
——— *v.* Freer. *In re* Freer – 622

G.

Gale, *In re.* Blake *v.* Gale – 820
———, Blake *v.* *In re* Gale – 820
Gaskill, Attorney-General *v.* – 537
Gaunt, Speight *v.* *In re* Speight 727
Geisel, *Ex parte.* *In re* Stanger 436
General Credit and Discount Company *v.* Glegg – – 549
Gleadow *v.* Leetham – – 269
Glegg, General Credit and Discount Company *v.* – – 549
Great Western Railway Company, *Ex parte.* *In re* Bushell 470
——————————— *v.* Swindon and Cheltenham Extension Railway Company – 677
Green *v.* Smith. *In re* Smith – 586
Greene *v.* Foster – – – 566
Grundy, Stanley *v.* – – – 478
Guinness *v.* Land Corporation of Ireland – – – – 349
Guthrie *v.* Walrond – – 573

H.

Hadley, Joy *v.* – – – 571
Harford, Davis *v.* – – – 128
Harris *v.* Jenkins – – – 481
Haygarth's Trusts, *In re* – – 545
Hayward, Francis *v.* – – 177
Hill, East and West India Dock Company *v.* – – – 14
Holyoake, Willoughby Osborne *v.* – – – – – 238
Hone's Trusts, *In re* – – 663
Huddlestone, Miller *v.* – – 233
Hudson, *Ex parte.* *In re* Walton – – – – – 773
Hughes-Hallett *v.* Indian Mammoth Gold Mines Company – 561

I.

Indian, Kingston, and Sandhurst Mining Company, *In re* – 83
Indian Mammoth Gold Mines Company, Hughes-Hallett *v.* 561
Isherwood, *Ex parte.* *In re* Knight – – – – 384

J.

PAGE

Jacobson, *Ex parte*. *In re* Pincoffs – – – – – 312
Jenkins, Harris *v.* – – – 481
Jervis *v.* Lawrence – – – 202
Johnstone, Eager *v.* *In re* Eager 86
Jones, *In re*. *Ex parte* Nichols 782
Joy *v.* Hadley – – – 571

K.

Knight, *In re*. *Ex parte* Isherwood – – – – – 384

L.

Land Corporation of Ireland, Guinness *v.* – – – 349
Lawrence, Jervis *v.* – – 202
Lees *v.* Fisher – – – 283
Leetham, Gleadow *v.* – – 269
Lemann's Trusts, *In re* – – 633
Lewis, McHenry *v.* – – 397
Loosemore *v.* Tiverton and North Devon Railway Company – 25
Lyons, Manchester (Mayor of) *v.* 287

M.

McHenry, *In re*. *Ex parte* Walker – – – – 813
——— *v.* Lewis – – – 397
Manchester (Mayor of) *v.* Lyons 287
Mansel *v.* Norton – – – 769
Marriott, Peareth *v.* – – 182
Mason, *In re*. Mason *v.* Cattley 609
——— *v.* Cattley. *In re* Mason 609
Mather, Birch *v.* – – – 629
Memorandum. Opening of the Royal Courts of Justice – 1
Metropolitan and District Railways Act, *In re*. *Ex parte* St. John Baptist College, Oxford 93
Metropolitan Board of Works, Spencer *v.* – – – – 142
Milan Tramways Company, *In re*. *Ex parte* Theys – – 122
Miller *v.* Huddlestone – – 233
——, Mullens *v.* – – – 194
Moate's Trusts, *In re* – – 635
Morris, *In re*. *Ex parte* Webster 136

PAGE

Morrish, *In re*. *Ex parte* Dyke (Sir W. H.) – – – 410
Mullens *v.* Miller – – – 194
Mutual Society, *In re* – – 714

N.

New Callao, *In re* – – – 484
Nichols, *Ex parte*. *In re* Jones 782
——— *v.* Evens – – – 611
Nicholson *v.* Smith – – – 640
Norton, Mansel *v.* – – – 769

O.

Orr Ewing, *In re*. Orr Ewing *v.* Orr Ewing – – – 456
——— *v.* Orr Ewing. *In re* Orr Ewing – – – – 456

P.

Palmer's (J. B.) Application, *In re* – – – – – 88
Peacock, Biggs *v.* – – – 284
Peareth *v.* Marriott – – 182
Phillips, *In re*. *Ex parte* Bath – 450
Pigott, Wilder *v.* – – – 263
Pincoffs, *In re*. *Ex parte* Jacobson – – – – – 312
Popple *v.* Sylvester – – – 98
Pott *v.* Brassey. *In re* Allnutt 275
Pumfrey, *In re*. Worcester City and County Banking Company *v.* Blick – – – – 255

R.

Raymond *v.* Tapson – – 430
Ridler, *In re*. Ridler *v.* Ridler 74
——— *v.* Ridler. *In re* Ridler 74
Ritso, *Ex parte*. *In re* Ritso – 529
Robins, *In re*. *Ex parte* Russell 778
Robinson, *Ex parte*. *In re* Robinson – – – – – 816
Russell, *Ex parte*. *In re* Robins 778

S.

St. John Baptist College, Oxford, *Ex parte*. *In re* Metropolitan and District Railways Act – 93
Sands to Thompson – – 614

PAGE

Smith, *In re.* Green *v.* Smith – 586
———, Elliott *v* – – – 236
———, Green *v.* *In re* Smith – 586
———, Nicholson *v.*– – – 640
——— *v.* Watts. *In re* Watts – 5
Soares, Beazley *v.* – – – 660
Speight, *In re.* Speight *v.* Gaunt 727
——— *v.* Gaunt. *In re* Speight 727
Spencer *v.* Metropolitan Board of Works – – – – 142
Stanger, *In re.* *Ex parte* Geisel 436
Stanley *v.* Grundy – – – 478
Stone, De Geer *v.* – – – 243
Storer, Eaton *v.* – – – 91
Strickland *v.* Symons – – 666
Sutton *v.* Sutton – – – 511
Swindon and Cheltenham Extension Railway Company, Great Western Railway Company *v.* – – – – 677
Sylvester, Popple *v.* – – 98
Symons, Strickland *v.* – – 666

T.

Tapson, Raymond *v.* – – 430
Taylor's Estate, *In re.* Tomlin *v.* Underhay – – – 495
Terrell, *In re* – – – – 473
Theys, *Ex parte.* *In re* Milan Tramways Company – – 122
Thompson, Sands to – – 614
Tiverton and North Devon Railway Company, Loosemore *v.* – 25
Tomlin *v.* Underhay. *In re* Taylor's Estate – – – 495
Turner, Wilson *v.* – – – 521

U.

PAGE

Underhay, Tomlin *v.* *In re* Taylor's Estate – – – 495

W.

Wacher, *In re* – – – 535
Wade *v.* Wilson – – – 235
Walker, *Ex parte.* *In re* McHenry 813
——— *v.* Bunkell – – – 722
Walrond, Guthrie *v.* – – 573
Walton, *In re.* *Ex parte* Hudson 773
Ward, *Ex parte.* *In re* Ward – 132
Watts, *In re.* Smith *v.* Watts – 5
———, Smith *v.* *In re* Watts – 5
Webster, *Ex parte.* *In re* Morris 136
Wheater, Wood *v.* – – – 281
White *v.* White – – – 555
Wilder *v.* Pigott – – – 263
Wilkinson, *Ex parte.* *In re* Berry 788
Williams *v.* Brisco – – – 441
Willoughby Osborne *v.* Holyoake – – – – – 238
Wilson *v.* De Coulon – – 841
——— *v.* Turner – – – 521
———, Wade *v.* – – – 235
Wood *v.* Wheater – – – 281
Worcester City and County Banking Company *v.* Blick. *In re* Pumfrey – – – 255
Wynter, Bullmore *v.* – – 619

Y.

Yeates *v.* Fraser. *In re* Fraser 827

TABLE OF CASES CITED.

A.

		PAGE
Aaronson, Ex parte	7 Ch. D. 713	774
Abadam *v.* Abadam	33 Beav. 475	186, 271
Adams *v.* London and Blackwall Railway Company	2 Mac. & G. 118	44
Admiralty, Case of the	12 Rep. 302	319
Agriculturist Cattle Insurance Company, In re	4 Ch. D. 34, n.	99
Aird's Estate, In re	12 Ch. D. 291	495
Alexandra Palace Company, In re	21 Ch. D. 149	353
Allen, Ex parte	20 Ch. D. 341	416
—— *v.* Hilton	1 Fonbl. Eq. 432	647
Anderson's Case	7 Ch. D. 75	354
Andrew *v.* Trinity Hall	9 Ves. 525	575
Anonymous	23 L. J. (Ch.) 24	432
Antrobus *v.* Davidson	3 Mer. 569	563
Arnold *v.* Arnold	2 My. & K. 365	574
Ashbury Railway Carriage and Iron Company *v.* Riche	Law Rep. 7 H. L. 653	353
Ashton *v.* Langdale (Lord)	4 De G. & Sm. 402	206
Ashworth, Ex parte	Law Rep. 18 Eq. 705	438
Aspinall *v.* Duckworth	35 Beav. 307	116
Astley *v.* Manchester, Sheffield, and Lincolnshire Railway Company	2 De G. & J. 453	46
Attorney-General *v.* Birmingham (Council of)	4 K. & J. 528	226
—— *v.* Cambridge (Mayor of)	Law Rep. 6 H. L. 303	299
—— *v.* Colney Hatch Lunatic Asylum	Law Rep. 4 Ch. 146	226
—— *v.* Cox	3 H. L. C. 240	422
—— *v.* Dakin	Law Rep. 4 H. L. 338	318
—— *v.* Dorking (Guardians of Poor of Union of)	20 Ch. D. 595	226
—— *v.* Great Eastern Railway Company	11 Ch. D. 449; 5 App. Cas. 473	365
—— *v.* Manchester (Bishop of)	Law Rep. 3 Eq. 436	337
—— *v.* Shrewsbury Bridge Company	21 Ch. D. 752	45
—— *v.* Sturge	19 Beav. 597	828

		PAGE
Attorney-General for the Isle of Man *v.* Mylchreest	4 App. Cas. 294	31
Attree *v.* Hawe	9 Ch. D. 337	208
Atwool *v.* Merryweather	Law Rep. 5 Eq. 464, n	367
Austin *v.* Tawney	Law Rep. 2 Ch. 143	648
Australian Royal Mail Steam Navigation Company *v.* Marzetti	24 L. J. (Ex.) 273	541

B.

Bacon *v.* Bacon	Cro. Car. 601	248
—— *v.* ——	5 Ves. 331	739
Bailey *v.* Tindall	18 Jur. 668	547
Baker, In re	20 Ch. D. 230	825
—— *v.* Brereman	Cro. Car. 4th Ed. 418	228
—— *v.* Metropolitan Railway Company	31 Beav. 504	30
Ball, Ex parte	20 Ch. D. 670	774, 779
Bank of Castille *v.* Olaguivel	Seton on Decrees, 4th Ed. vol. ii. pt. 2, p. 1637	841
Bannerman's Estate, In re	21 Ch. D. 105	185, 270
Barker, In re	17 Ch. D. 241	624
—— *v.* Metropolitan Railway Company	17 C. B. (N.S.) 785	158
Barrow *v.* Barrow	4 K. & J. 409	264
Bartlett *v.* Rees	Law Rep. 12 Eq. 395	549
—— *v.* Wood	9 W. R. 817	102
Barton *v.* Tattersall	1 Russ. & My. 237	589
—— *v.* Wells	1 Hagg. Cons. 21	319
Barwick *v.* English Joint Stock Bank	Law Rep. 2 Ex. 259	198
Beddall *v.* Maitland	17 Ch. D. 174	31
Beddow *v.* Beddow	9 Ch. D. 89	837
Bedford *v.* (Duke of) *v.* Emmett	3 B. & Ald. 366	297
Beevor *v.* Luck	Law Rep. 4 Eq. 537	551
Belchier, Ex parte	Amb. 218	739
Benbow *v.* Low	16 Ch. D. 93	630
Betts *v.* Great Eastern Railway Company	3 Ex. D. 182; S. C. in D. P. 49 L. J. (Ex.) 197	46
Beverley *v.* Lincoln Gas Company	6 A. & E. 829	541
Bignold's Settlement Trusts	Law Rep. 7 Ch. 223	634
Birch *v.* Wright	1 T. R. 378	421
Bird, In re	Law Rep. 16 Eq. 203	733
Blount *v.* Harris	4 Q. B. D. 603	138
Blyth & Young, In re	13 Ch. D. 416	484
Boddington *v.* Clariat	22 Ch. D. 597	620
Bogo de Clare's Case	Co. 4th Inst. 24; Prynne's Parliamentary Writs, 819	319
Bostock *v.* Floyer	Law Rep. 1 Eq. 26	727
Bothy's Case	6 Rep. 30 a	647
Bovill *v.* Smith	Law Rep. 2 Eq. 459	630
Boyd's Settled Estates, In re	21 W. R. 667	93
Bradburn *v.* Foley	3 C. P. D. 129	771
Brecon (Mayor of) *v.* Edwards	31 L. J. (Ex.) 368	300
Brett *v.* Clowser	5 C. P. D. 376	180
—— *v.* East India and London Shipping Company	2 H. & M. 404	837
Brice *v.* Bannister	3 Q. B. D. 569	782
Bridges *v.* Smyth	5 Bing. 410	421
—— *v.* Wilts, Somerset, and Weymouth Railway Company	16 L. J. (Ch.) 335	31

		PAGE
Bridgland *v.* Shapter	5 M. & W. 375	300
Briscoe, In re	4 N. R. 311	95
Brook, Ex parte	10 Ch. D. 100	16, 416
Brooke *v.* Garrod	2 De G. & J. 62	649
——— *v.* Mostyn (Lord)	2 D. J. & S. 373	266
Brooks *v.* Keith	1 Dr. & Sm. 462	278
Brough *v.* Oddy	1 Russ. & My. 55	565
Brown, Ex parte	Law Rep. 9 Ch. 304	436, 531
——— *v.* Oakshott	12 Beav. 252	610
Browne *v.* Groombridge	4 Madd. 495	624
Browning *v.* Sabin	5 Ch. D. 511	572
Brumridge *v.* Brumridge	27 Beav. 5	734
Buckton *v.* Higgs	4 Ex. D. 174	613
Bullock *v.* Stones	2 Ves. Sen. 521	577
Burkinshaw *v.* Birmingham and Oxford Junction Railway Company	5 Ex. 475	158
Burton *v.* Slattery	5 Bro. P. C. 233	552
——— *v.* Sturgeon	2 Ch. D. 318	620
Butcher, Ex parte	13 Ch. D. 465	669
Button *v.* O'Neill	4 C. P. D. 354	138

C.

Caledonian Railway Company *v.* North British Railway Company	6 App. Cas. 114	148, 499
Calvin's Case	7 Rep. 18 a	248
Campbell *v.* French	3 Ves. 321	499
——— *v.* Reg.	11 Q. B. 799	318
Carpenter, In re	Kay, 418	615
Carron Iron Company *v.* Maclaren	5 H. L. C. 416	405, 462
Carter *v.* Wake	4 Ch. D. 605	549
Carver *v.* Bowles	2 Russ. & My. 304	557
Castle *v.* Warland	32 Beav. 660	739
Catt *v.* Tourle	Law Rep. 4 Ch. 654	837
Catterina Chiazzare, The	1 P. D. 368	399
Cefn Cilcen Mining Company	Law Rep. 7 Eq. 88	65
Chambers *v.* Toynbee	12 W. R. 1100	510
Chapleo *v.* Brunswick Permanent Building Society	6 Q. B. D. 696	66, 197
Chaplin's Trust, Re	12 W. R. 147	116
Chennell, In re	8 Ch. D. 492	102
Chinnery *v.* Evans	11 H. L. C. 115	822
Churchill *v.* Churchill	Law Rep. 5 Eq. 44	557
Clark *v.* Phillips	17 Jur. 886	116
Clarke *v.* Toleman	42 L. J. (Ch.) 23	568
——— *v.* Westrope	18 C. B. 765	417
Clayton's Case	1 Mer. 572	61
Clough *v.* Bond	3 My. & Cr. 490	732
Codrington *v.* Lindsay	Law Rep. 8 Ch. 578; 7 H. L. 854	Ibid. 266
Cohen *v.* Wilkinson	1 Mac. & G. 481	45
Collingwood *v.* Pace	1 Vent. 413	252
Collins *v.* Paddington (Vestry of)	5 Q. B. D. 368	486
Collyer *v.* Isaacs	19 Ch. D. 342	783
Commissioners of Sewers *v.* Gellatly	3 Ch. D. 610	399
Cook *v.* Fowler	Law Rep. 7 H. L. 27	99
——— *v.* Gregson	2 Drew. 286	462
Cook's Settled Estates, In re	Law Rep. 12 Eq. 12	94

		PAGE
Cooke *v.* Chilcott	3 Ch. D. 694	219
Copper Miners Company *v.* Fox	16 Q. B. 229	540
Corbett, Ex parte	14 Ch. D. 122	416
Corbyn *v.* French	4 Ves. 418	213
Cork and Youghal Railway Company, In re	Law Rep. 4 Ch. 748	61
Cotton's Trustees, In re	19 Ch. D. 624	286
Coventry *v.* Coventry	32 Beav. 612	278
Cowan, Ex parte	3 B. & A. 123	318
Cox *v.* Mitchell	7 C. B. (N.S.) 55	397
Craw *v.* Ramsey	Vaughan, 274	249
Crispin *v.* Cumano	Law Rep. 1 P. & M. 622	234
——— *v.* Doglioni	3 Sw. & T. 96; 32 L. J. (P. & M.) 169	461
Croft *v.* Lumley	6 H. L. C. 672	421
Crossley *v.* Elworthy	Law Rep. 12 Eq. 158	76
——— *v.* Tomey	2 Ch. D. 533	630
Cuming, In re	Law Rep. 5 Ch. 72	615
Curtis *v.* Sheffield	21 Ch. D. 1	190

D.

Dann, Ex parte	17 Ch. D. 76	788
Darke *v.* Williamson	25 Beav. 622	259
Daubney *v.* Shuttleworth	1 Ex. D. 53	507
Davies' Trusts, In re	Law Rep. 13 Eq. 163	239
——— Will, In re	29 Beav. 93	114
Davis *v.* Thomas	1 Russ. & My. 506	648
——— *v.* Whitmore	28 Beav. 617	569
Daw *v.* Eley	2 H. & M. 725	630
Day *v.* Brownrigg	10 Ch. D. 294	837
——— *v.* Gudgen	2 Ch. D. 209	569
Debeze *v.* Mann	2 Bro. C. C. 165	600
Defries *v.* Creed	13 W. R. 632; 34 L. J. (Ch.) 607	606
De Lusi's Trusts, In re	3 Ir. Law Rep. 232	240
De Mattos *v.* Gibson	4 De G. & J. 276	836
Dendy *v.* Nicholl	4 C. B. (N. S.) 376	421
Dent's Case	Law Rep. 8 Ch. 768	368
Dietrichsen *v.* Cabburn	2 Ph. 52	836
Dillon (Lord) *v.* Alvares	4 Ves. 357	397
Dix *v.* Burford	19 Beav. 409	734
Doble, Ex parte	26 W. R. 407	77
Dodds *v.* Hills	2 H. & M. 424	832
Doe *v.* Joinville	3 East, 172	113
——— *v.* Jones	4 T. R. 300	248
——— *v.* North Staffordshire Railway Company	16 Q. B. 526	31
——— *v.* Rock	Car. & M. 549; 4 Man. & G. 30	616
——— *v.* Rollings	17 L. J. (C. P.) 268	421
——— *v.* Rouse	5 C. B. 422	599
——— *v.* Walters	10 B. & C. 626	649
——— *v.* Watkins	7 East, 551	648
——— *v.* Williams	5 A. & E. 291	513
Doncaster *v.* Doncaster	3 K. & J. 26	285
Dorchester (Mayor of) *v.* Ensor	Law Rep. 4 Ex. 335	299
Dowell *v.* Dew	1 Y. & C. Ch. 345	648
Drakeford *v.* Drakeford	33 Beav. 43	119

		PAGE
Droitwich Patent Salt Company *v.* Curzon	Law Rep. 3 Ex. 35	353
Dronfield Silkstone Coal Company, In re	17 Ch. D. 76	353
Drosier *v.* Brereton	15 Beav. 221	734
Drummond *v.* Drummond	Law Rep. 2 Ch. 32	87
——— *v.* Sant	Law Rep. 6 Q. B. 763	615
Duignan, Ex parte	Law Rep. 6 Ch. 605	417
Duke's Case	1 Ch. D. 620	354
Dunkirk Colliery Company *v.* Lever	9 Ch. D. 20	726
Duppa *v.* Mayo	Saunders by Williams (Ed. 1871), Vol. I. p. 436	421

E.

Eade *v.* Jacobs	3 Ex. D. 335	630
Eaglesfield *v.* Londonderry (Marquis of)	4 Ch. D. 693	197
Eames *v.* Hacon	16 Ch. D. 407	461
East and West India Dock Company, Ex parte	17 Ch. D. 759	16
Ebbw Vale Steel, Iron, and Coal Company, In re	4 Ch. D. 827	370
Edmonds, Ex parte	4 D. F. & J. 488	670
Edmunds *v.* Waugh	2 N. R. 408; 4 Drew. 275	577
Edwards *v.* Edwards	2 Ch. D. 291	606
——— *v.* Martin	7 W. R. 30	551
Edwick *v.* Hawkes	18 Ch. D. 199	31
Elderton's Case	2 Ld. Raym. 978; 3 Salk. 91, 284	338
Elliott *v.* Freeman	7 L. T. (N. S.) 715	138
Ellis, Ex parte	2 Ch. D. 797	793
———	Law Rep. 6 Ch. 602	799
Ellis *v.* Bridgnorth (Corporation of)	2 J. & H. 67	295
Enohin *v.* Wylie	10 H. L. C. 1	461
Enraght *v.* Penzance (Lord)	7 App. Cas. 240	318
Evans, Ex parte	13 Ch. D. 252	607
——— *v.* Wood	Law Rep. 5 Eq. 9	563
European Central Railway Company, In re	4 Ch. D. 33	99

F.

Falkner *v.* Somerset and Dorset Railway Company	Law Rep. 16 Eq. 458	45
Fane *v.* Fane	13 Ch. D. 228	102
Faviell *v.* Gaskoin	7 Ex. 273	771
Festing *v.* Taylor	3 B. & S. 217	270
Field *v.* Carnarvon and Llanberis Railway Company	Law Rep. 5 Eq. 190	30
Finch *v.* Squire	10 Ves. 41	205
Finnegan *v.* James	Law Rep. 19 Eq. 72	630
Fisher, Ex parte	Law Rep. 7 Ch. 636	793
Fitzgerald *v.* Chapman	1 Ch. D. 563	620
Flitcroft's Case	21 Ch. D. 519	367
Flower *v.* Lloyd	45 L. J. (Ch.) 746; 20 Sol. J. 860	630
Forbes *v.* Forbes	18 Beav. 552	828

		PAGE
Ford *v.* Chesterfield (Earl of)	16 Beav. 516	569
Fordham *v.* Wallis	10 Hare, 217	823
Forrer *v.* Nash	35 Beav. 167	106
Foster *v.* Foster	1 Ch. D. 588	624
Fothergill *v.* Rowland	Law Rep. 17 Eq. 132	836
Foxley, Ex parte	Law Rep. 3 Ch. 515	790
Foy's Trusts, In re	23 W. R. 744	94
Francis *v.* Dodsworth	4 C. B. 202	591
Franklin *v.* Carter	1 C. B. 750	421
Frazer *v.* Jones	5 Hare, 475	568
Freeman *v.* Pope	Law Rep. 5 Ch. 538	78
Frodsham *v.* Frodsham	15 Ch. D. 317	635
Furber *v.* Furber	30 Beav. 523	569
Furniss *v.* Midland Railway Company	Law Rep. 6 Eq. 473	31

G.

Gardner *v.* London, Chatham, and Dover Railway Company	Law Rep. 2 Ch. 201	208
Gardnor *v.* Shaw	19 W. R. 753	138
Garland, Ex parte	10 Ves. 110	670
Garnett *v.* Bradley	3 App. Cas. 944	95
Garrard *v.* Tuck	8 C. B. 231	615
Garrett *v.* Noble	6 Sim. 504	8
Gateward's Case	6 Rep. 59 b	228
Gayford *v.* Moffatt	Law Rep. 4 Ch. 133	180
German Mining Company's Case	4 D. M. & G. 19	65, 260
Giles *v.* Giles	1 Keen, 685	599
—— *v.* London, Chatham, and Dover Railway Company	1 Dr. & Sm. 406	683
Ginesi *v.* Cooper	14 Ch. D. 596	508
Gisborne *v.* Gisborne	2 App. Cas. 300	190
Glegg, Ex parte	19 Ch. D. 7	16, 415
Glossop *v.* Heston and Isleworth Local Board	12 Ch. D. 102	226
Godwin *v.* Francis	Law Rep. 5 C. P. 295	444
Gooch's Case	Law Rep. 7 Ch. 207	717
Good *v.* Cheesman	2 B. & Ad. 328	799
Goodchap *v.* Roberts	14 Ch. D. 49	99
Goodright *v.* Cator	2 Doug. 477	421
Gorton *v.* Gregory	3 B. & S. 90	771
Gosling *v.* Veley	4 H. L. C. 679	318
Gowing *v.* Mowberry	11 N. R. 851	568
Grant *v.* Banque Franco-Egyptienne	1 C. P. D. 143	84
Great Northern Railway Company *v.* East and West India Docks, &c., Railway Company	7 Rail. Cas. 356	683
Great Western Railway Company *v.* Smith	2 Ch. D. 235; 3 App. Cas. 165	33
Greaves *v.* Fleming	4 Q. B. D. 226	613
Green, Ex parte	7 Q. B. D. 273	319
—— *v.* Britten	42 L. J. (Ch.) 187	573
Greener, Ex parte	46 L. J. (Bkcy.) 76	793
Grey *v.* Pearson	6 H. L. C. 61	148
Grimwood *v.* Moss	Law Rep. 7 C. P. 360	416
Guest *v.* Poole and Bournemouth Railway Company	Law Rep. 5 C. P. 553	31, 158

H.

		PAGE
Hale, Ex parte	1 Ch. D. 285	415
Harding *v.* Preece	9 Q. B. D. 281	157
Harlock *v.* Ashberry	19 Ch. D. 539	281, 513
Harries *v.* Bryant	4 Russ. 89	647
Harris, In re	15 Ch. D. 561	208
——— *v.* Lewis	8 Jur. 1063	507
Harrison, Ex parte	18 Ch. D. 127	479
——— *v.* Mexican Railway Company	Law Rep. 19 Eq. 358	354
Hart *v.* Tulk	6 Hare, 611	507
Harvie *v.* South Devon Railway Company	32 L. T. (N.S.) 1	32
Hawes *v.* Hawes	14 Ch. D. 614	113
Hawker, Ex parte	Law Rep. 7 Ch. 214	790
Hawkins *v.* Hawkins	13 Ch. D. 470	574
Haycock, Ex parte	5 Russ. 154	624
Haynes *v.* Haynes	1 Dr. & Sm. 426	29
Haywood *v.* Brunswick Permanent Building Society	8 Q. B. D. 403	219
Heath *v.* Crealock	Law Rep. 10 Ch. 22	568
——— *v.* Pugh	6 Q. B. D. 345; 7 App. Cas. 235	281
Henry *v.* Smith	2 D. & War. 381	514
Henty *v.* Wren	21 Ch. D. 332	210
Herbert *v.* Salisbury and Yeovil Railway Company	Law Rep. 2 Eq. 221	552
Hewer *v.* Cox	3 E. & E. 428	138
Hext *v.* Gill	Law Rep. 7 Ch. 699	31
Higgins *v.* Samels	2 J. & H. 460	198
Hill *v.* Midland Railway Company	21 Ch. D. 143	683
Hillary *v.* Waller	12 Ves. 239	615
Hilliard *v.* Fulford	4 Ch. D. 389	102
Hillman, Ex parte	10 Ch. D. 622	78
Hills *v.* Croll	2 Ph. 60	837
Hoare *v.* Osborne	12 W. R. 661; 33 L. J. (Ch.) 586	238
Holles (Lady) *v.* Wyse	2 Vern. 289	552
Holmes *v.* Newcastle-upon-Tyne Freehold Abattoir Company	1 Ch. D. 682	353
Holroyd *v.* Marshall	10 H. L. C. 191	787
Hooper *v.* Bourne	5 App. Cas. 1	49
Hope, Ex parte	27 L. J. (Bkcy.) 40; 6 W. R. 789	417
—— *v.* International Financial Company	4 Ch. D. 327	370
Hopgood *v.* Parkin	Law Rep. 11 Eq. 74	727
Horsfield *v.* Ashton	2 Jur. (N.S.) 193; 6 Jur. (N.S.) 355	576
Howard *v.* Sewell	1 W. R. 124	432
Howse *v.* Chapman	4 Ves. 542	208
Hudson *v.* Tooth	3 Q. B. D. 46	319
Hughes *v.* Wynne	T. & R. 307	581
Hunt *v.* Elmes	2 D. F. & J. 578	568
—— *v.* Wimbledon Local Board	3 C. P. D. 208; 4 C. P. D. 48	540
Hunter *v.* Nockolds	1 Mac. & G. 640	514
Hussey *v.* Horne-Payne	4 App. Cas. 311	444
Hutton *v.* Scarborough Cliff Hotel Company	2 Dr. & Sm. 514; 4 D. J. & S. 672	369
Hyde *v.* Wrench	3 Beav. 334	446

I.

		PAGE
Innes *v.* Mitchell	4 Drew. 57; 1 De G. & J. 423	462
Islington Market Bill	3 Cl. & F. 513	295

J.

Jackson, Ex parte	14 Ch. D. 725	479
——— *v.* Saunders	1 Sch. & Lef. 443	647
James, Ex parte	Law Rep. 8 Eq. 225	124
——— *v.* James	Law Rep. 16 Eq. 153	283
Jameson & Co. *v.* Brick and Stone Company	4 Q. B. D. 208	590
Jarman *v.* Chatterton	20 Ch. D. 493	210
Jenkins *v.* Jones	Law Rep. 2 Eq. 323	624
Job *v.* Job	6 Ch. D. 562	733
Johnson, Ex parte	12 Ch. D. 905	436
———, In re	15 Ch. D. 548	669
Jones *v.* Carter	15 M. & W. 718	416
——— *v.* Green	Law Rep. 5 Eq. 555	622
——— *v.* Lewis	2 Ves. Sen. 240	733
——— *v.* Lloyd	Law Rep. 18 Eq. 265	264
Joy *v.* Birch	4 Cl. & F. 57; 10 Bli. (N.S.) 201	650
—— *v.* Campbell	1 Sch. & Lef. 328	744
Julius *v.* Oxford (Bishop of)	5 App. Cas. 214	41, 348

K.

Kahen, Ex parte	21 Ch. D. 871	138
Kelly, Ex parte	7 Ch. D. 161	589
Kemp *v.* South Eastern Railway Company	Law Rep. 7 Ch. 364	30
Kennedy *v.* Liddy	Ir. Rep. 1 C. L. 105	421
Kennell *v.* Abbott	4 Ves. 802	599
Kerrison's Trusts, In re	Law Rep. 12 Eq. 422	524
Kidderminster (Mayor of) *v.* Hardwick	Law Rep. 9 Ex. 13	540
King, Ex parte	2 Ch. D. 256	790
Kirksmeaton (Rector of), Ex parte	20 Ch. D. 203	94
Knapp *v.* Williams	4 Ves. 430, n.	208
Knowles *v.* Holden	24 L. J. (Ex.) 223	319

L.

Ladbury, Ex parte	17 Ch. D. 532; 45 L. T. (N.S.) 5	384, 391
Laing *v.* Reed	Law Rep. 5 Ch. 4	65
Lamb *v.* North London Railway Company	Law Rep. 4 Ch. 522	45
Langham *v.* Great Northern Railway Company	1 De G. & Sm. 486	31
Langmead *v.* Cockerton	25 W. R. 315	94
Lawson *v.* Widdrington	1 Lev. 85	647
Learoyd, Ex parte	10 Ch. D. 3	437
Leedham *v.* Chawner	4 K. & J. 458	259

		PAGE
Leeming, In re	3 D. F. & J. 43	622
Lees *v.* Patterson	7 Ch. D. 866	125
Leggott *v.* Barrett	15 Ch. D. 306	508
Lennon *v.* Napper	2 Sch. & Lef. 682	647
Lethbridge *v.* Thurlow	15 Beav. 334	186, 270
Lewis *v.* Brass	3 Q. B. D. 667	541
——— *v.* Duncombe	29 Beav. 175	514
Little *v.* Heaton	2 Ld. Raym. 750	421
Little's Case	8 Ch. D. 806	484
Lloyd *v.* Dimmack	7 Ch. D. 398	563
London (Mayor of) *v.* Cox	Law Rep. 2 H. L. 239	318
——— (Corporation of) *v.* Low	49 L. J. (Q.B.) 144	300
——— (City of) *v.* Mitford	14 Ves. 41	647
——— and South Western Railway Company *v.* Gomm	20 Ch. D. 562	219
Long *v.* Ovenden	16 Ch. D. 691	577
Looker *v.* Wrigley	9 Q. B. D. 397	68
Lovat (Lord) *v.* Leeds (Duchess of)	2 Dr. & Sm. 62	185, 270
Lowrey *v.* Barker	5 Ex. D. 170	417
Lucas *v.* James	7 Hare, 410	219
Ludlow (Mayor of) *v.* Charlton	6 M. & W. 815	540
Lugar *v.* Harman	1 Cox, 250	113
Lumley *v.* Wagner	1 D. M. & G. 604	836

M.

McAlpin *v.* Smith	1 B. & B. 285	647
McAndrew *v.* Barker	7 Ch. D. 701	484
Macclesfield (Mayor of) *v.* Chapman	12 M. & W. 20	295
——— *v.* Pedley	4 B. & Ad. 397	311
McCulloch, Ex parte	14 Ch. D. 716	817
Macdougall *v.* Jersey Imperial Hotel Company	2 H. & M. 528	353
Mace *v.* Metropolitan Board of Works	33 L. J. (Ch.) 377	683
M'Hattie, Ex parte	10 Ch. D. 398	138
Mackay *v.* Commercial Bank of New Brunswick	Law Rep. 5 P. C. 394	198
——— *v.* Douglas	Law Rep. 14 Eq. 106	78
Mackenzie, Ex parte	Law Rep. 7 Eq. 240	124
Mackonochie *v.* Penzance (Lord)	6 App. Cas. 424	318
Mainwaring's Settlement, In re	Law Rep. 2 Eq. 487	275
Mali Ivo, The	Law Rep. 2 A. & E. 356	399
Malins *v.* Freeman	2 Keen, 25	540
Manchester (Corporation of) *v.* Peverley	22 Ch. D. 294	301
Manning *v.* Flight	3 B. & Ad. 211	16
Markham *v.* Markham	16 Ch. D. 1	531
Marlow *v.* Pitfeild	1 P. Wms. 558	669
Marsden *v.* Wardle	3 E. & B. 695	318
Marshall, Ex parte	5 Ch. D. 873	313
——— *v.* Berridge	19 Ch. D. 233	446
Martin *v.* Mackonochie	4 Q. B. D. 697	318
Martyr *v.* Lawrence	2 D. J. & S. 261	180
Mason *v.* Baker	2 K. & J. 567	114
Mathias *v.* Mathias	3 Sm. & Giff. 552	261
Mathews *v.* Brise	6 Beav. 239	732
Mauritz, Ex parte	Law Rep. 5 Ch. 779	799
Meacher *v.* Young	2 My. & K. 490	523
Meiklan *v.* Melville	24 Beav. 100	461

		PAGE
Melbourne Banking Corporation *v.* Brougham	4 App. Cas. 156	541
Mendes *v.* Guedalla	2 J. & H. 259	732
Metropolitan Board of Works *v.* London and North Western Railway Company	17 Ch. D. 246	221
Metropolitan District Railway Company and Cosh, In re	13 Ch. D. 607	683
——— *v.* Sharpe	5 App. Cas. 425	157, 686
Meux's Executors' Case	2 D. M. & G. 522	593
Midland Railway Company *v.* Checkley	Law Rep. 4 Eq. 19	33
Mills *v.* Haywood	6 Ch. D. 196	648
Mitchell's Estate, In re	6 Ch. D. 655	208
Moffett *v.* Bates	3 Sm. & Giff. 468	575
Monck *v.* Monck	1 B. & B. 298	600
Moore *v.* Smith	32 L. T. (O. S.) 314	318
Morris *v.* Colman	18 Ves. 437	837
Mosley *v.* Chadwick	3 Doug. 117; 7 B. & C. 47, n	288
——— *v.* Pierson	4 T. R. 104	288
——— *v.* Walker	7 B. & C. 40	288
Mulliner *v.* Midland Railway Company	11 Ch. D. 611	30
Mundy *v.* Howe (Earl)	4 Bro. C. C. 224	521
Myers *v.* Perigal	2 D. M. & G. 599	209

N.

National Funds Assurance Company, In re	10 Ch. D. 118	353
Newington Local Board *v.* Cottingham Local Board	12 Ch. D. 725	226
Newton *v.* Chorlton	10 Hare, App. 31	507
Nicholls *v.* Maynard	3 Atk. 519	552
Nisbett *v.* Murray	5 Ves. 149	574
Noble *v.* Edwardes	5 Ch. D. 378	106
Northfield Iron and Steel Company, In re	14 L. T. (N.S.) 695	470
Nyeford's Case	Co. 3rd Inst. 141; Prynne's Parliamentary Writs, 1189	319

O.

O'Connell *v.* Reg.	11 Cl. & F. 155	318
O'Farrell *v.* Stephenson	Law Rep. 4 Q. B. 151, 715	16
O'Mahoney *v.* Burdett	Law Rep. 7 H. L. 388	237
Ortigosa *v.* Brown	47 L. J. (Ch.) 168	832
Ostell *v.* Lepage	5 De G. & Sm. 95	399
Owen *v.* Delamere	Law Rep. 15 Eq. 134	670
Oxenden *v.* Compton (Lord)	2 Ves. 69	623

P.

Page, Ex parte	2 Ch. D. 323	776
Pankhurst *v.* Howell	Law Rep. 6 Ch. 136	600
Parmiter *v.* Parmiter	2 D. F. & J. 526	531
Partridge *v.* Partridge	Cas. t. Tal. 226	624

		PAGE
Paterson, Ex parte	11 Ch. D. 908	410
Peacock *v.* Stockford	3 D. M. & G. 73	113
Pearce *v.* Graham	32 L. J. (Ch.) 359	664
Peareth *v.* Marriott	22 Ch. D. 182	270
Pears *v.* Laing	Law Rep. 12 Eq. 41	822
Pearson's Case	5 Ch. D. 336	126
Peat *v.* Jones	8 Q. B. D. 147	422
Pemberton *v.* Chapman	7 El. & Bl. 210	823
Penniall *v.* Harborne	11 Q. B. 368	106
Penryn (Mayor of) *v.* Best	3 Ex. D. 292	300
Peruvian Railway Company, In re	Law Rep. 2 Ch. 617	366
Peters *v.* Lewes and East Grinstead Railway Company	18 Ch. D. 429	286
Petre *v.* Petre	1 Drew. 371	615
Pettit's Estate, In re	1 Ch. D. 478	589
Phayre *v.* Peree	3 Dow. 116	262
Phené *v.* Gillan	3 Hare, 1	564
Philipps *v.* Philipps	4 Q. B. D. 127	482
Pigot *v.* Cubley	15 C. B. (N.S.) 701	833
Pigott *v.* Great Western Railway Company, In re	18 Ch. D. 146	155
Pinchin *v.* London and Blackwall Railway Company	5 D. M. & G. 851	33, 683
Pinède's Settlement, In re	12 Ch. D. 667	239
Pipon *v.* Pipon	Ambl. 799	462
Polden *v.* Bastard	Law Rep. 1 Q. B. 156	180
Pollard, In re	Law Rep. 2 P. C. 106	318
Popplewell, Ex parte	21 Ch. D. 73	138
Porter *v.* Fox	6 Sim. 485	116
Postmaster-General, Ex parte	10 Ch. D. 595	337
Potter *v.* Inland Revenue (Commissioners of)	10 Ex. 147	661
Poynder *v.* Great Northern Railway Company	16 Sim. 3; 2 Ph. 330	35
Preston *v.* Melville	8 Cl. & F. 1	461
Price *v.* Jenkins	5 Ch. D. 619	74
Prince *v.* Lewis	5 B. & C. 363	297
Prior of Dunstable's Case, The	Year Book 11 Hen. VI. pl. 13	311
Professional, Commercial, and Industrial Benefit Building Society, In re	Law Rep. 6 Ch. 856	65
Propert, In re	22 L. J. (Ch.) 948; 1 W. R. 237	615
Punnett, Ex parte	16 Ch. D. 226	479

R.

Radcliffe, In re	7 Ch. D. 733	606
Ramsay *v.* Blair	1 App. Cas. 701	35
Rance's Case	Law Rep. 6 Ch. 104	353
Ranelagh (Lord) *v.* Melton	2 Dr. & Sm. 278	648
Ranelaugh (Lord) *v.* Hayes	1 Vern. 189	561
Rangeley *v.* Midland Railway Company	Law Rep. 3 Ch. 306	45
Ransome *v.* Burgess	Law Rep. 3 Eq. 773	521
Rawson *v.* Samuel	Cr. & Ph. 161	124
Rawstorne *v.* Bentley	4 Bro. C. C. 415	647
Redgrave *v.* Hurd	20 Ch. D. 1	198
Reg. *v.* Birmingham and Oxford Junction Railway Company	15 Q. B. 634	33
—— *v.* Stone	Law Rep. 1 Q. B. 529	158

		PAGE
Rex *v.* Bates	3 Price, 341	208
—— *v.* Stobbs	3 T. R. 735	319
—— *v.* Winstanley	8 Price, 180	208
Rhodes, Ex parte	15 Ves. 539	589
Richmond *v.* North London Railway Company	Law Rep. 5 Eq. 352; 3 Ch. 679	30
———— *v.* White	12 Ch. D. 361	606
Right *v.* Cuthell	5 East, 491	650
Rishton *v.* Cobb	5 My. & Cr. 145	597
Roberts *v.* Berry	3 D. M. & G. 284	647
Robinson, Ex parte	31 L. J. (Bkcy.) 12	453
———— *v.* Wheelwright	6 D. M. & G. 535	266
Rochdale Canal Company *v.* King	2 Sim. (N.S.) 78	226
Roddam *v.* Morley	1 De G. & J. 1	822
Rose *v.* Hart	8 Taunt. 499	589
Rossiter *v.* Miller	3 App. Cas. 1124	541
Royal Bank of Scotland *v.* Cuthbert	1 Rose, 462	817
Rubery *v.* Jervoise	1 T. R. 229	647
Russell, Ex parte	19 Ch. D. 588	78

S.

Sadler *v.* Rickards	4 K. & J. 302	186, 271
Saffery, Ex parte	5 Ch. D. 365	486
Saffron Walden Second Benefit Building Society *v.* Rayner	14 Ch. D. 406	650
St. Mary, Wigton (Vicar of), Ex parte	18 Ch. D. 646	94
Salisbury (Marquis of) *v.* Great Northern Railway Company	17 Q. B. 840	31
Saltash (Mayor of) *v.* Goodman	43 L. T. (N.S.) 464	84
Sander *v.* Heathfield	Law Rep. 19 Eq. 1	607
Sargent, Ex parte	Law Rep. 17 Eq. 273	830
Saunders *v.* Jones	7 Ch. D. 435	630
Scarf *v.* Jardine	7 App. Cas. 345	421
Schloss *v.* Stiebel	6 Sim. 1	599
Schwinge *v.* London and Blackwall Railway Company	3 Sm. & Giff. 30	30
Serjeant *v.* Dale	2 Q. B. D. 558	318
Sewell, Ex parte	13 Ch. D. 266	312
Shannon *v.* Bradstreet	1 Sch. & Lef. 52	129
Sharp *v.* St. Sauveur	Law Rep. 7 Ch. 343	248
Shaw *v.* M'Mahon	4 D. & War. 431	116
Shaw's Settled Estates, In re	Law Rep. 14 Eq. 9	94
Shawe *v.* Cunliffe	4 Bro. C. C. 144	578
Shrewsbury and Birmingham Railway Company *v.* London and North Western Railway Company	4 D. M. & G. 115	30
Shropshire Union Railway and Canal Company *v.* Reg.	Law Rep. 7 H. L. 496	833
Sidebotham *v.* Barrington	4 Beav. 110	107
Silcock *v.* Farmer	46 L. T. (N.S.) 404	410
Simpson *v.* Westminster Palace Hotel Company	2 D. F. & J. 141; 8 H. L. C. 712	366
Sims *v.* Thomas	12 A. & E. 536	514
Smalley *v.* Hardinge	6 Q. B. D. 371; 7 Q. B. D. 524	16
Smith *v.* Boucher	1 Sm. & Giff. 72	283
——— *v.* Cannan	2 El. & Bl. 35	790
——— *v.* Day	13 Ch. D. 651	226

		PAGE
Smith *v.* Lucas	18 Ch. D. 531	264
—— *v.* Smith	3 Hagg. Eccl. 757	319
Smyth *v.* North	Law Rep. 7 Ex. 242	16, 416
Sparks *v.* Spink	7 Taunt. 311	318
Spencer's Case	5 Rep. 16 a	220
Spirett *v.* Willows	3 D. J. & S. 293	78
Staff, Ex parte	Law Rep. 20 Eq. 775	774
Stainton *v.* Metropolitan Board of Works	23 Beav. 225	227
Stamford (Earl of) *v.* Dawson	Law Rep. 4 Eq. 352	475
Stanhope's Trusts, In re	27 Beav. 201	116
Stephens, Ex parte	7 Ch. D. 127	16
—— *v.* De Medina	3 G. & D. 110; 12 L. J. (Q. B.) 120	649
Stirling-Maxwell *v.* Cartwright	11 Ch. D. 522	460
Stocken *v.* Stocken	4 Sim. 152; 4 My. & Cr. 95	523
Stockton Iron Furnace Company, In re	10 Ch. D. 335	479
Strathmore (Earl of) *v.* Laing	2 Wils. & Sh. 1	318
Strode *v.* Parker	2 Vern. 316	552
Stubbins, Ex parte	17 Ch. D. 58	728
Sutton *v.* Sutton	22 Ch. D. 511	579
—— *v.* Wilders	Law Rep. 12 Eq. 373	732
Swire *v.* Francis	3 App. Cas. 106	198

T.

Taddy's Settled Estates, In re	Law Rep. 16 Eq. 532	94
Talbot *v.* Frere	9 Ch. D. 568	606
—— *v.* Kemshead	4 K. & J. 93	568
—— *v.* Marshfield	2 Dr. & Sm. 549	609
—— *v.* Radnor (Earl of)	3 My. & K. 252	575
—— de Malahide (Lord) *v.* Odlum	Ir. Rep. 5 C. L. 302	421
Tamplin *v.* James	15 Ch. D. 215	542
Tann, In re	Law Rep. 7 Eq. 436	102
Tatlock *v.* Smith	6 Bing. 339	799
Taylor *v.* Gillott	Law Rep. 20 Eq. 682	16
—— *v.* Grange	15 Ch. D. 165	286
—— *v.* Johnson	2 P. Wms. 504	584
—— *v.* Oldham (Corporation of)	4 Ch. D. 395	683
Teevan *v.* Smith	20 Ch. D. 724	616
Terrell, Ex parte	4 Ch. D. 293	773
Thomas *v.* Williams	14 Ch. D. 864	837
Thompson *v.* Griffin	Cr. & Ph. 317	528
—— *v.* Hudson	Law Rep. 4 H. L. 1	552
Thorne *v.* Kerr	2 K. & J. 54	823
Thornton *v.* Kempson	Kay, 592	206
Thorold's Settled Estate, In re	Law Rep. 14 Eq. 31	94
Threlfall, Ex parte	46 L. J. (Bkcy.) 8	790
Till, Ex parte	Law Rep. 10 Ch. 631	815
Titterton *v.* Cooper	9 Q. B. D. 473	389, 424
Toft *v.* Stephenson	1 D. M. & G. 28	822
Toleman *v.* Portbury	Law Rep. 6 Q. B. 245; Ibid. 7 Q. B. 344	416, 423
Townsend *v.* Westacott	2 Beav. 340	76
Trower *v.* Knightley	6 Madd. 134	286
Truman *v.* Redgrave	18 Ch. D. 547	607
Tuck *v.* Fyson	6 Bing. 321	16
Tucker, Ex parte	12 Ch. D. 308	438
Tulk *v.* Moxhay	2 Ph. 774	219

		PAGE
Turner *v.* Mullineux	1 J. & H. 334	186, 271
Tyrone (Earl of), *v.* Waterford (Marquis of)	1 D. F. & J. 613	574

U.

Ungley *v.* Ungley	5 Ch. D. 887	541

V.

Van Hagan, In re	16 Ch. D. 18	239
Venour's Settled Estates, In re	2 Ch. D. 522	511
Voisey, Ex parte	21 Ch. D. 442	385

W.

Walker *v.* Milne	11 Beav. 507	208
——— *v.* Mottram	19 Ch. D. 355	505
Wall *v.* Hall	11 W. R. 298	94
—— *v.* Wall	15 Sim. 513	186, 273
Wall's (Count) Case	3 Knapp, P. C. 13	248
Wallace *v.* Attorney-General	Law Rep. 1 Ch. 1	462
Wallis *v.* Smith	21 Ch. D. 243	552
Walsh *v.* Lincoln (Bishop of)	Law Rep. 4 A. & E. 242	399
Walters *v.* Walters	18 Ch. D. 182	606
Walton, Ex parte	17 Ch. D. 746	16, 424
Ward, Ex parte	20 Ch. D. 356	133, 313
——— *v.* Painter	5 My. & Cr. 298	589
Warren *v.* Rudall	1 J. & H. 1	575
Waterlow *v.* Sharp	Law Rep. 8 Eq. 501	65
Watson *v.* Cave (No. 1)	17 Ch. D. 19	399
——— *v.* Mid-Wales Railway Company	Law Rep. 2 C. P. 593	126
Watts *v.* Kelson	Law Rep. 6 Ch. 166	180
Weatherby *v.* St. Giorgio	2 Hare, 624	462
Weaver, In re	21 Ch. D. 615	523
Wedderburn *v.* Wedderburn	4 My. & Cr. 585	399
Weir *v.* Barnett	3 Ex. D. 32	198
Wentworth *v.* Wentworth	Sty. 242	646
West of England Bank, In re	12 Ch. D. 823	589
Weston *v.* Collins	34 L. J. (Ch.) 353	649
——— *v.* Savage	10 Ch. D. 736	107
Wheeldon *v.* Burrows	12 Ch. D. 31	210
Whistler *v.* Webster	2 Ves. 367	557
White, In re	Law Rep. 5 Ch. 698	536
——— *v.* Grane	18 Beav. 571	523
Whitmore *v.* Turquand	3 D. F. & J. 107; 1 J. & H. 444	800, 803
Wickens *v.* Townshend	1 Russ. & My. 361	604
Wier, Ex parte	Law Rep. 7 Ch. 319	313
Wilkinson *v.* Gibson	Law Rep. 4 Eq. 162	620
——— *v.* Joughin	Law Rep. 2 Eq. 319	599
Willey *v.* South Eastern Railway Company	1 Mac. & G. 58	32
Williams, Ex parte	18 Ch. D. 495	774
Williamson, Ex parte	Law Rep. 5 Ch. 309	65

		PAGE
Wilson *v.* Atter	44 L. T. (N.S.) 240	116
——— *v.* Metcalfe	1 Beav. 263	234
——— *v.* Wallani	5 Ex. D. 155	416
——— *v.* Wilson	14 C. B. 616	107
Wilson's Case	Law Rep. 12 Eq. 521	66
Winder, Ex parte	1 Ch. D. 290	790
Wing *v.* Tottenham and Hampstead Junction Railway Company	Law Rep. 3 Ch. 740	44
Winter *v.* Miles	1 Camp. 475, n.	318
——— *v.* ———	10 East, 578	338
——— *v.* Winter	5 Hare, 306	665
Wollaston *v.* King	Law Rep. 8 Eq. 165	557
Wolverhampton and Walsall Railway Company *v.* London and North Western Railway Company	Law Rep. 16 Eq. 433	835
Wood *v.* Roberts	2 Stark. 417	800
Wood's (Ann) Will, In re	31 Beav. 323	119
Wooldridge *v.* Norris	Law Rep. 6 Eq. 410	563
Woolley *v.* Colman	21 Ch. D. 169	553
Woolridge *v.* Woolridge	Joh. 63	555
Worsley *v.* South Devon Railway Company	16 Q. B. 539	31
Wrixon *v.* Vyse	3 D. & War. 104	513
Wycombe Railway Company *v.* Donnington Hospital	Law Rep. 1 Ch. 268	540
Wyndham *v.* Wyndham	3 Bro. C. C. 58	578

Y.

York (Dean of), In re	2 Q. B. 1	318
York and North Midland Railway Company *v.* Reg.	1 E. & B. 178, 858	30
York Union Banking Company *v.* Artley	11 Ch. D. 205	236
Young *v.* Kitchin	3 Ex. D. 127	125
——— & Co. *v.* Leamington Corporation	8 Q. B. D. 579	540
Ystalyfera Iron Company *v.* Neath and Brecon Railway Company	Law Rep. 17 Eq. 142	33

MEMORANDUM.

OPENING OF THE ROYAL COURTS OF JUSTICE.

On Monday, the 4th of December, 1882, the Royal Courts of Justice were formally opened by Her Majesty the Queen, in the presence of a great and distinguished assembly, including a large number of members of the Bar, and of the Incorporated Law Society.

At the main entrance of the building the Queen was received by the Lord Chancellor (Lord Selborne), Her Majesty's Judges, the Attorney and Solicitor-General, the Prime Minister (Chancellor of the Exchequer), and the First Commissioner of Works (The Right Hon. George Shaw-Lefevre); and was joined by His Royal Highness the Prince of Wales (Bencher of the Middle Temple), His Royal Highness the Duke of Connaught (Bencher of Gray's Inn), His Royal Highness the Duke of Albany (Bencher of Lincoln's Inn), His Royal Highness the Prince Christian of Schleswig-Holstein (Bencher of the Inner Temple), and other members of the Royal family, who had awaited Her Majesty's arrival.

A procession having been formed, Her Majesty was conducted to a dais erected at the north end of the Hall, where the Secretary of State for the Home Department (The Right Hon. Sir W. G. Vernon-Harcourt) took his place at Her Majesty's right hand.

The First Commissioner of Works then offered to Her Majesty the key of the building in the following words:

"May it please your Majesty:—

"Your Commissioners of Works and Public Buildings have been charged with the erection of this building during the last

eight years. It is now complete. It falls upon me to announce to your Majesty that it is ready to be constituted as 'the certain place' in which, in accordance with the ancient laws of your kingdom, justice shall be administered in the future by your Majesty's Courts."

Her Majesty, having accepted the key, delivered it to the keeping of the Lord Chancellor, and spoke as follows:—

"My Lord Chancellor:—

"I deliver into your charge with this key the care of these Courts of Law. I trust that the uniting together in one place of the various branches of Judicature in this my Supreme Court will conduce to the more efficient and speedy administration of justice to my subjects, and I have all confidence that the independence and learning of the Judges, supported by the integrity and ability of the other members of the profession of the law, will prove in the future, as they have been in times past, a chief security for the rights of my Crown and the liberties of my people."

The Lord Chancellor received the key and, on behalf of himself and the Judges of England, thus addressed Her Majesty:—

"May it please your Majesty:—

"In the name and on behalf of the assembled Judges of your Majesty's Supreme Court of Judicature, I accept the charge which your Majesty has been pleased to lay upon me; and I ask permission to offer to your Majesty the humble expression of our loyal devotion to your Majesty's person and throne, and of our gratitude for the part which your Majesty has been graciously pleased to take in the solemnity of this day. This building, now complete, was authorized by your Majesty with the concurrence of Parliament, in the year 1865, and it has been in progress for more than eight years, under the hands of a great architect, to whom it has not been permitted to see this day. Your Majesty, whose strength of sympathy is so well known to us all, will, I am sure, share the feelings of your subjects when they think of those who are no longer with us—of the architect whom we have lost,

and of that good prelate, venerable as much for his wisdom and virtue as for his great office, from whose lips we might have hoped, not many months since, to hear the Divine blessing invoked upon us to-day. Man passes away, but his works remain. This building, we trust, will remain to a remote posterity, one of the most magnificent public works of the time in which we live. These Royal Courts of Justice, stately enough to satisfy even those who are most accustomed to Westminster Hall, will not, like Westminster Hall, recall the memories of Norman or Plantagenet, of Tudor or Stuart kings; but they will be for ever associated with the name of your Majesty, and with the glories of a reign happy, beyond all which have preceded it, in those qualities of the Sovereign which have caused your Majesty to be so universally beloved and revered, in the advancement of all the arts of civilization, and in the general peace and prosperity of the British people. Among the legislative improvements which have distinguished your Majesty's reign, not the least has been the consolidation and union of the several branches of the Supreme Judicature, which formerly exercised divided jurisdiction. To give full effect to that great change, it was necessary that the different Courts and offices should be brought together in one edifice, fit for the duties which they have to perform. This has at last been done; and your Majesty, by your gracious presence here to-day, has given a signal proof of your care for that justice which will here be administered in your name. It was, indeed, fitting, and worthy of your Majesty, that these Royal Courts should be dedicated to their future use by the Sovereign of these realms, whose noblest prerogatives are justice and mercy, and from whom all jurisdiction within the British dominions is derived. Your Majesty's Judges are deeply sensible of their own many shortcomings, and of their need of that assistance which they have constantly received from the Bar of England, and from the other members of the legal profession; but, encouraged by your Majesty's gracious approval, and having before them the examples of a long line of illustrious predecessors, they have endeavoured, and will always endeavour, to fulfil the great duties entrusted to them with fidelity to your Majesty, with zeal for the public service, with firmness, impartiality, and integrity, in the fear of God, and without fear

of man. That they, and their successors, may be enabled truly to do justice within these walls, as long as the British name shall endure; that the blessing of the Almighty may rest upon their labours; that the law which they administer may ever be a terror to evil-doers, and a strength and support to those who have right on their side; and that your Majesty may be preserved for many future years, still to shed fresh lustre upon a throne founded on law, sustained by justice, and established in the hearts of your Majesty's people, is the fervent prayer of all the Judges of your Majesty's Supreme Court of Judicature, for whom on this august occasion it has been my privilege to address your Majesty."

The Archbishop of York offered up a prayer.

The Queen then declared the building open.

Her Majesty's State Trumpeters, stationed at the north end of the Hall, announced the event by a flourish of trumpets.

The Attorney-General, on behalf of the Bar of England, humbly prayed Her Majesty to direct that the proceedings should be entered upon the records of the Supreme Court.

The Queen, through The Lord Chancellor, signified her royal consent that "it should be done as prayed."

Addresses were then presented to Her Majesty by His Royal Highness the Prince of Wales, accompanied by the four Treasurers, on behalf of the Inns of Court; and by the Lord Chancellor, accompanied by the President of the Incorporated Law Society, on behalf of that society, and the proceedings terminated.

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re WATTS.
SMITH *v.* WATTS.

C. A.
1882
Nov. 3.

[1881 W. 2164.]

Mortgage to secure Moneys due from Mortgagor "his Executors, Administrators, or Assigns"—Advance to Assign—Costs of Mortgagee—Costs of Adjournment to Judge.

W., the owner and occupier of a public-house, gave to *H. & Co.*, brewers, a mortgage to secure £1300, and also all sums which should at any time be owing to them from *W.* "his executors, administrators, or assigns" on any account whastoever. *W.* died giving, by will, all his property to his wife for life, without any directions as to carrying on his business. Letters of administration, with the will annexed, were granted to the widow. The widow carried on the business, and was supplied with beer by *H. & Co.*, to whom she from time to time made payments which discharged the moneys due to them from *W.* at his decease other than the £1300, but a balance of £138 was due from her to them at her decease for beer supplied. *H. & Co.* sold the property under a power of sale, and claimed to retain not only the £1300 but the £138. The question was raised on summons in an action for the administration of *W.*'s estate. The Chief Clerk was prepared to make an order without costs against *H. & Co.* to pay into Court the balance of purchase-money in their hands without deducting the £138; but *H. & Co.* insisted on having the case heard by the Judge. *Kay*, J., held that they must pay in the balance without deducting the £138, and ordered them to pay the costs of the adjournment to him as being in the nature of an unsuccessful appeal:—

Held, on appeal, that as the widow was assign of the public-house, the £138 was covered by the security, and *H. & Co.* were entitled to retain it:

Held, also, that the adjournment to the Judge was not in the nature of

C. A.
1882
In re WATTS.
SMITH
v.
WATTS.

an appeal, it being the right of *H. & Co.* to have the point heard by the Judge personally, and that even if they had been wrong on the merits they ought not to have been ordered to pay costs, for that a mortgagee cannot be deprived of costs merely because he claims *bonâ fide* something more than the Court holds him entitled to.

BY an indenture of transfer of mortgage and further charge dated the 18th of November, 1875, a freehold beershop called the *Admiral*, belonging to *William Watts*, and in which he carried on business, was conveyed to two persons on behalf of the firm of *Hoare & Co.*, brewers, subject to a proviso that, if *Watts*, "his executors, administrators, or assigns," should, at the expiration of three days from the date of the deed, pay to the mortgagees or the partners or partner for the time being in the firm of *Hoare & Co.*, their or his executors, administrators, or assigns, £1300 with interest at £5 per cent. per annum, and should also immediately on demand in writing given or left as therein mentioned, pay to the mortgagees or such partners or partner for the time being as aforesaid, their or his executors, administrators, or assigns, all sums of money which should at any time be due from *Watts* (not mentioning his executors, administrators, or assigns) to the mortgagees or such partners or partner as aforesaid, their or his executors, administrators, or assigns, for goods sold, money lent, or upon any other account or accounts whatsoever, with interest at the rate aforesaid, the mortgagees, their executors, administrators, or assigns would, at the request and costs of *Watts*, "his executors, administrators, or assigns, re-convey and re-assign to him and them" the mortgaged property. *Watts* covenanted with the mortgagees, "their executors, administrators, and assigns" that he, his "heirs, executors, or administrators" would at the expiration of the three days pay to the mortgagees, or the partners or partner for the time being, in the firm of *Hoare & Co.*, their or his executors, administrators, or assigns, the £1300 and interest, and would on such demand as aforesaid, or without demand, pay to the mortgagees or the partners or partner for the time being, their or his executors, administrators or assigns, all sums of money which should be owing from *Watts* (not mentioning executors, administrators, or assigns) to the mortgagees or such partners or partner

as aforesaid, with interest as aforesaid. "And it is hereby agreed and declared that these presents shall be a continuing security to the mortgagees and such partners or partner for the time being as aforesaid, their or his executors, administrators, and assigns, for all sums and sum of money from time to time or at any time hereafter to be due and owing to them or him from the said *W. Watts*, his executors, administrators, or assigns, on any account whatsoever, not exceeding the sum of £1500 principal money." The deed contained a power of sale.

Watts died on the 19th of April, 1880, having made a will dated the 13th of August, 1869, whereby he gave all his property to his wife during her widowhood, and appointed two executors. He gave no direction as to carrying on his trade. One executor died in the testator's lifetime, and the other renounced, and letters of administration with the will annexed were granted to the widow, who continued to carry on her husband's business.

On the 2nd of June, 1881, an order was made in this action on the application of a creditor for administration of the estate of *Watts*. It was also ordered that a receiver should be appointed who was to manage the testator's business, and that until the receiver was appointed the widow should continue to carry on the business. She accordingly carried it on until her death, which took place on the 21st of October, 1881, making payments from time to time to *Hoare & Co.*, and receiving fresh beer from them. The result was that the amount due from *Watts* at his death for goods supplied was paid off, but at the death of the widow there was due, in respect of beer supplied to her while carrying on the business, £138 17*s.* 11*d.*

The mortgagees sold the property under their power of sale, and the question was whether, in addition to the £1300, their right to which was not disputed, they could also retain the £138 17*s.* 11*d.* out of the proceeds of sale. In order to avoid the expense of a separate action, the mortgagees came in and submitted to having the question decided on summons in the present action. They admitted a balance of £385 13*s.* 1*d.* in their hands, and if the above debt were disallowed the balance would be £524 11*s.*

The summons, which was by the personal representative of the

C. A. 1882 — *In re* WATTS. SMITH *v.* WATTS.

testator, asked that *Hoare & Co.* might be ordered to pay in the £524 11*s.*, and to pay the costs of the application. The Chief Clerk held that the order ought to be made, but without costs. *Hoare & Co.* insisted on the matter being brought before *Kay*, J., personally, and his Lordship in Chambers ordered payment into Court of the £524 11*s.*, and directed the costs of the applicant and of the plaintiff of the application before the Chief Clerk to be costs in the action, but ordered that their costs of the adjournment to the Judge should be paid by *Hoare & Co.*, treating it as an unsuccessful appeal by *Hoare & Co.*

Hoare & Co. appealed.

Hastings, Q.C., and *Langworthy*, for the appeal:—

The decision strikes the word "assigns" out of the mortgage. If "executors or administrators" only had been mentioned they might be taken as referring only to a debt contracted by *Watts*, but which, owing to his death, had become due from his executors or administrators; but the word "assigns" cannot be so explained. The object was to secure the moneys due from the person who succeeded to the public-house and carried on business there. The business has been carried on by our goods, and the creditors get a benefit from that. The widow carried on the business under the sanction of the Court, and they cannot be heard to say that her carrying it on was improper, and even without the sanction of the Court, her doing so would probably have been supported: *Garrett* v. *Noble* (1). Then, as to costs, an adjournment to the Judge in person is not an appeal, and there is no ground for making us pay costs. The honestly claiming too much does not deprive a mortgagee of costs.

Robinson, Q.C., and *Dauney*, for the personal representative, and *W. Pearson*, Q.C., and *W. G. Robinson*, for the Plaintiff:—

The administratrix had no authority to carry on the business, and it is not a reasonable construction of the deed to hold that it included expenses incurred in carrying on the business without authority. *Hoare & Co.* were, in fact, parties to a breach of trust in supplying her with goods for a trade which she had no right to

(1) 6 Sim. 504.

carry on. The proviso for redemption is for reconveyance on payment of what was due from *Watts* only, and the final clause is only a bungling provision inserted for the purpose of making the security a continuing security to the partners for the time being.

JESSEL, M.R.:—

There are two points made on this appeal, and the second one is so important that, though our decision in the first makes it unnecessary to decide the second, I shall deliver judgment on both points.

The first point raised by the Appellants was that a certain sum of £138 ought not to have been disallowed. The sum in question was a debt due to Messrs. *Hoare & Co.*, the brewers, from the widow of a Mr. *Watts*, who had previously carried on the business of a beer-seller in a beer-house which belonged to him as owner in fee-simple, and was subject, when he acquired it, to a mortgage to Messrs. *Hoare*. He made a new mortgage to them to secure £1300 and interest, and whatsoever should become due to them from him, his executors, or assigns. After his death it turned out that he had devised the beer-house to his wife for life with remainder over. She became his administratrix, and carried on the business for some time till the creditors intervened and instituted an administration suit. The estate is insolvent, and therefore both his real and personal estate so far as they go must be applied in payment of his debts. The brewers having continued to supply beer to the widow after the testator's death, and having sold the beer-house, claimed to deduct from the proceeds of the sale, not merely the amount of the debt due to them from the testator, but the amount of the debt for the beer sold to the widow. Their right to that deduction must depend entirely on the terms of the mortgage. The owner of a freehold estate, if he is so minded, may mortgage it not only for his own debt, but for the debt of his cousin or widow, or anybody else he pleases. On the part of the Appellants it is alleged, that, according to the true construction of the deed, the beer-house was charged, not only with the debt due from *Watts*, but with any debt to become due from his assign. That is perfectly intelligible. It may have been in the contemplation of the parties, that *Watts* would assign the house

C. A. 1882 ~~ *In re* WATTS. SMITH *v.* WATTS. Jessel, M.R.

subject to the mortgage, and that the assign might come in and take beer from *Hoare & Co.*, and that they might have a charge on the beer-house for the amount of beer so supplied. That is perfectly rational, and is a thing which both parties might well contemplate.

In opposition to this, the Respondents urge that the word "assigns," is a large word in law, and would include a tenant, or, as in this case, a devisee for life, and that it is not probable that they were intended. The answer is, very likely not. The parties to the deed probably did not think of those exceptional cases, but only of an assign out and out, and taking the word in that sense, the curious clause which I am about to mention, is quite rational. The difficulty in the way of the Respondents is to find anything in the deed authorizing us to put a restricted meaning on the word "assigns." The mortgage deed is not a very artistically drawn instrument, and there is room for argument upon it. The proviso for redemption is a proviso that on payment of the moneys due from *Watts*, the mortgagees would, at the request and costs of *Watts*, "his executors, administrators, or assigns," reconvey the mortgaged property to him and them. It is plain that the assigns mentioned there are the assigns of the beer-house, for the reconveyance must be to the owners of the equity of redemption, and though I agree that the word "heirs," should have been introduced, still the meaning is clear.

When we come to the covenant for payment we find that is for payment not only to the mortgagees, but to the partners or partner for the time being in the firm of *Hoare & Co.* of all sums which shall from time to time be due and owing from *William Watts* alone. Then we have the clause, "It is hereby agreed and declared that these presents shall be a continuing security to the mortgagees and such partners or partner for the time being as aforesaid, their or his executors, administrators, and assigns, for all sums and sum of money from time to time, or at any time hereafter to be due and owing to them or him, from the said *William Watts*, his executors, administrators, or assigns, on any account whatsoever, not exceeding the sum of £1500 principal money." I was, at first, very much struck with the words "executors or administrators," because as it is a freehold public-

house, we should expect to find the words "heirs and assigns;" but I have no doubt that the same mistake prevails in this clause, and that "executors, administrators, and assigns," mean the owners for the time being, and that makes the whole instrument consistent. What the parties meant was that the owner of the public-house for the time being should not be entitled to redeem the public-house without paying for the beer supplied to the owners for the time being. Unless we read the clause in this way, the word "assigns" is virtually struck out, and following the rule that we are to give some effect to all the words used, if any reasonable meaning can be attributed to them, and also following the rule that we are to construe them with regard to what is usually expected to happen, I think the right reading is that the property is pledged for the debt of the assign to *Hoare & Co.*, as well as for what was due to them from *Watts*.

If that is so, then as there is no doubt that the widow was the assign in law, the brewers had a right to say, "By contract, this house is pledged to us for the beer supplied to the widow as assign."

Then it is said that the widow had no right to carry on the trade. I am of opinion that she had. I was in hopes that it would have been necessary for the Court of Appeal to have said something about the powers of administrators as to carrying on trades, because it is a point which is not completely covered by authority; but in this case, the widow as assign, had a right to carry on any trade she pleased in her own beer-house, for she was tenant for life of it, and therefore properly carried on the trade. She may have been guilty of a breach of trust in using for that purpose property which she was not entitled so to use, but there is no allegation of that. It therefore is not necessary to say more than that the trade was properly carried on, and that being so, I cannot see that the Respondents can defeat the claim of the brewers on the ground that they were parties to a breach of trust.

There is also this further consideration. The creditors finding the widow in possession of the beer-house, thought that it would be a good thing to sell it as a going concern, and they therefore obtained an order that the widow should continue to manage the business until a receiver was appointed, and then the receiver was

C. A. 1882 — *In re* WATTS. SMITH *v.* WATTS. — Jessel, M.R.

to carry it on and sell the business as a going concern. How then can they be heard to say that the business was wrongfully carried on?

The second point is this: The brewers having lost the case in the Court below, were ordered to pay a portion of the costs. It appears to me that this was an entire mistake. The Chief Clerk decided against them, and they then took the case to the Judge. That is not an appeal. They were entitled to have the opinion of the Judge, and especially so on such a point as this, a point of construction of a serious and arguable kind. If a mortgagee brings in his account, and under a wrong impression of the law, but *bonâ fide* and honestly, makes a claim which cannot be supported and is disallowed, he does not pay the costs; and even if the brewers had failed I should have held them entitled to their costs in the Court below. Under the present circumstances, of course they are entitled to their costs both here and below.

I have only one further observation to make and it is this, that in all cases where a claim is brought against an estate in an administration action, only one party should attend to oppose it. The General Order XVI., r. 12a (Ord. April 1880, XVI. 8) ought to have been attended to. As a general rule, the executor or administrator is the proper person to attend, unless the Court otherwise orders. The personal representative here took out the summons, and, in strictness, the Plaintiff ought not to have been allowed to appear. As no opposition was made to it, we heard Mr. *Pearson* for the Plaintiff, but it must not be considered as a precedent, and if such a case occurs again, I shall certainly, as far as I am concerned, not allow any costs to the unnecessary party.

The appeal must be allowed with costs, both above and below, to the Appellants, who will take them out of the fund in their hands.

COTTON, L.J.:—

I agree with the Master of the Rolls on the questions which arise on this appeal. It is unfortunate that we have not a note of the judgment of the learned Judge, because we should have been glad to know what his reasoning was. The case seems to me to depend entirely on the last clause in the mortgage deed. If that

clause had not been in the deed then the proviso for redemption would have been a proviso requiring the mortgagees to hand back the property on payment of the debt due from *Watts*, the mortgagor. It is urged by the Respondents that this clause was inserted only for the purpose of making the mortgage a continuing security in favour of the partners for the time being in the brewery. Undoubtedly, one intention of the clause was to make that more plain, but it really was not necessary for that purpose, as the previous clauses had made the mortgage a security for what should be due from *Watts* to the partners for the time being. This clause contains something more, and, admitting that one reason for inserting it was to make more clear the continuation of the security in favour of the partners, why are we on that ground to disregard what is contained in the latter part of the clause? The clause says that the mortgage shall be a security to the partners for what is due from "*William Watts*, his executors, administrators, or assigns." Undoubtedly, the covenant did not go to that, but having regard to the nature of the security given by a beer-house keeper to his brewers, I think that the intention was not only to make this a security in favour of the partners in the brewery for the time being, but to make it a security for what should be due from those who were *Watts's* assigns of the beer-house and carrying on the business there.

That being so, is this debt a debt due by the assign of *Watts?* It is a debt arising during the time that the widow as tenant for life was carrying on the business there, and was incurred in respect of the business. In my opinion, it comes within the terms of this proviso, and we have no right to disregard those terms so as to deprive the mortgagees of the security which is given them in sufficiently clear terms by the words used. It is not necessary to rely on the proceedings of the creditors in the action, but I in no way differ from the Master of the Rolls as to the bearing which the conduct of the creditors in the action has on the present application.

I will add one word to what was said by the Master of the Rolls as regards the costs. All mortgagees, unless they misbehave themselves, have a right to their costs, and it cannot be said that when a mortgagee having such a point as this requires it to be

C. A. 1882 *In re* WATTS. SMITH *v.* WATTS. Cotton, L.J.

brought before the Judge personally, he is guilty of anything wrong. He has a right to require that the matter should be decided by the Judge himself, and although he was unsuccessful, he ought not to have been made to pay the costs of going before the Judge and taking his opinion upon such a point. That, in the present case, becomes immaterial, because in our opinion the Appellants were right, and therefore, of course they will have their costs and will deduct them from the money they have in hand in respect of the sale of the mortgaged property.

Discharge the Order of Mr Justice *Kay*, and direct the Appellants, after deducting their costs above and below, and the moneys due to them, to pay the balance into Court. The costs of the Respondents to be costs in the action.

Solicitors: *Sandilands, Humphry, & Armstrong; Lewty & Bendle; James Chapman.*

H. C. J.

C. A. 1882 V.-C. H. *March* 24; *April* 4. C. A. *Nov.* 4.

EAST AND WEST INDIA DOCK COMPANY *v.* HILL.

[1881 E. 1842.]

Bankruptcy—Disclaimer of Lease by Trustee—Rights of Lessor against Third Parties—32 & 33 *Vict. c.* 71, *s.* 23.

The assignee of a lease became bankrupt, and his trustee disclaimed under the 23rd section of the *Bankruptcy Act*, 1869. In an action brought by the lessor against the original lessee upon the covenant in his lease, for rent accrued since the commencement of the bankruptcy:—

Held (affirming the decision of *Hall*, V.C.), that the disclaimer by the trustee of the assignee did not affect the rights and liabilities of the lessor and the original lessee, and that the lessee was still liable under his covenant.

DEMURRER.

The statement of claim contained the following allegations.

By an indenture dated the 2nd of December, 1875, the Plaintiffs, *the East and West India Dock Company*, demised a public-house, called the *Brunswick Tap*, at *Blackwall*, to the Defendant *A. Hill*

for the term of twenty-one years from the 25th of March, 1875, at the annual rent of £300, payable during the said term in quarterly payments on the usual quarter days.

The indenture contained, among other covenants, a covenant by the Defendant with the lessors for payment of the rent thereinbefore reserved on the days and times thereinbefore appointed for payment thereof, clear of all deductions.

By an indenture of the same date, but executed after the last-mentioned indenture, the Defendant assigned the premises for the whole residue of the term to *Robert Clarke*, who covenanted in the usual way to pay the rent and observe the covenants of the original lease.

On the 3rd of December, 1875, *Clarke* demised the premises to Messrs. *Truman, Hanbury, & Buxton*, for the residue of the term, except the last three days thereof, at a peppercorn rent by way of mortgage for securing the repayment of £1000 advanced by them to him. The mortgagees never took possession of the premises.

On the 10th of February, 1881, *Clarke* filed a petition for liquidation in the *London* Bankruptcy Court, and on the 4th of March, 1881, a trustee was appointed of his liquidation.

On the 12th of March, 1881, the Defendant gave notice to the trustee requiring him to decide whether he would disclaim the property comprised in the said lease.

The trustee applied to the Court for leave to disclaim the debtor's interest in the lease under the 23rd section of the *Bankruptcy Act*, 1869. The lessors opposed the application, on the ground that the effect of the disclaimer would be to destroy the lease, and to deprive them of their remedies against the Defendant upon his covenants. The mortgagees also opposed the application upon the ground that the disclaimer would destroy their underlease. The Registrar granted the application of the trustee.

The Plaintiffs appealed to the Court of Appeal, but the Court, on the 30th of June, 1881, affirmed the Registrar's decision and dismissed the appeal with costs.

The trustee accordingly disclaimed all the property and interest of *Clarke* in the said leasehold premises.

The Plaintiffs did not re-enter into possession of the premises, or accept any other tenant. They now claimed £225 from the

C. A. 1882

EAST AND WEST INDIA DOCK COMPANY v. HILL.

Defendant, being the rent of the premises since the last payment by the bankrupt.

The Defendant demurred to the claim so far as it related to the rent accrued since the appointment of the trustee in bankruptcy.

The demurrer came on to be heard before Vice-Chancellor *Hall* on the 24th of March, 1882.

W. Pearson, Q.C., and *MacSwinney*, for the Defendant, in support of the demurrer, contended that the lessee's liability determined from the date of the adjudication; or at all events from the time when the trustee disclaimed the lease: *Smyth* v. *North* (1); *Taylor* v. *Gillott* (2); *Smalley* v. *Hardinge* (3); *Ex parte Walton* (4); *O'Farrell* v. *Stephenson* (5); *Ex parte East and West India Dock Company* (6); *Ex parte Stephens* (7); *Ex parte Glegg* (8); *Ex parte Brook* (9); *Tuck* v. *Fyson* (10); *Manning* v. *Flight* (11); *Robson* on Bankruptcy (12); 6 Geo. 4, c. 16, s. 75; 12 & 13 Vict. c. 106, s. 45; 32 & 33 Vict. c. 71, s. 23.

Kekewich, Q.C., and *Latham*, for the Plaintiffs, were not called on.

HALL, V.C.:—

The question in this case is of great general importance, and it is one the ultimate decision of which I will not venture to predict, as the nature of that ultimate decision will undoubtedly be matter for serious argument before the Court of Appeal. My duty, however, is to deal with the case as I consider a Judge of first instance ought to deal with it, having regard to the previous cases and the decisions thereon. After reading over the judgments given in many of these cases more than once, and all of them I believe once, I have, in my judgment, no choice but to decide this case by holding that the Plaintiffs are entitled to maintain

(1) Law Rep. 7 Ex. 242.
(2) Law Rep. 20 Eq. 682.
(3) 6 Q. B. D. 371; 7 Q. B. D. 524.
(4) 17 Ch. D. 746.
(5) Ir. Law Rep. 4 Q. B. 151, 715.
(6) 17 Ch. D. 759.
(7) 7 Ch. D. 127.
(8) 19 Ch. D. 7.
(9) 10 Ch. D. 100.
(10) 6 Bing. 321.
(11) 3 B. & Ad. 211.
(12) 4th Ed. p. 434.

their action; in other words, by overruling the contention of Mr. *Pearson*.

It appears to me, first of all, that I ought to consider the judgments of the two learned Barons of the Exchequer (*Martin*, B., and *Pigott*, B.), who decided the case of *Smyth* v. *North* (1). The difference of opinion expressed in the judgment of Baron *Bramwell* in that case does not enable me I think to adopt his view rather than that of the other Judges, notwithstanding the criticisms which have been made upon the case, and what has been said as to the actual decision having been displaced by the subsequent cases referred to which have been decided with regard to chattels (2). It seems to me that in deciding those latter cases the Court has considered itself at liberty, or bound, to adopt with reference to chattels a more literal construction of the 23rd section than has been adopted in reference to leases. They considered that they should adopt a literal construction in reference to the particular subject-matter that they were dealing with in those cases, namely, the chattels; but they have I consider treated those cases as a class of their own, and to be regulated by a law of their own, and as cases not calling for, according to the letter of the 23rd section, a peculiar and special construction of the statute. In fact, if the Courts had adopted as to leaseholds the principle which they had applied to the case of chattels, they would, as I understand their view, have had to construe the Act in a way which would have created grave injustice, or, as one of the learned Judges spoke of it, have led to a "revolting absurdity," and therefore when they had to deal with leasehold property vested in the bankrupt they adopted a special construction, and arrived at this conclusion, that the object as regards leases, at all events, was one which only had reference to the bankrupt, the trustee, and the bankrupt's lessor, whether it was an underlease or not. I will now refer to the case of *Ex parte Walton*. The Master of the Rolls says (3): "The 23rd section must be read as meaning that the property is to be disclaimed *inter se*, so as not to interfere with the rights of third parties, and only for the benefit of the bankrupt and his estate;

(1) Law Rep. 7 Ex. 242.
(2) *Ex parte Stephens*; *Ex parte Brook*; *Ex parte Glegg*.
(3) 17 Ch. D. 754.

C. A. 1882 EAST AND WEST INDIA DOCK COMPANY v. HILL. V.-C. H.

so far, that is, as respects any rights and liabilities in relation to it as between the trustee and the person who is entitled to the benefit of those obligations which attach to the property; so far only as is necessary in order to relieve the bankrupt and his estate and the trustee from liability. The general words of the section are to be limited to the relief, on the one hand, of the bankrupt, his trustee and his estate from liability, and on the other hand, to the protection of the person whose direct rights against the bankrupt are affected by the disclaimer, by giving him a right to prove against the bankrupt's estate for the amount of the injury. In accordance with this principle it appears to me that the disclaimer has been properly allowed in the present case, and that it will not affect the right of the lessors to distrain upon the property for the rent reserved by the original lease, or to re-enter for breach of the covenants contained in it." So that there is an express decision that there is, notwithstanding this disclaimer, the right of distress for the rent reserved or of re-entry for breach of the covenants. The lease is still existing for all those purposes. The only little portion that is left out to make the thing complete is to read that as expressing also that they had not only those rights, but in addition the right to sue upon the covenants. That is all. Was it meant to draw any distinction between the remedy upon covenants, the remedy by distress, and the remedy by re-entry? I cannot think that there was any such distinction intended. Lord Justice *James* in his judgment puts it very shortly. He says (1): "When the statute says that a lease, which was never surrendered in fact (a true surrender requiring the consent of both parties, the one giving up and the other taking), is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grievous injustice, and the most revolting absurdity, 'shall, as between the lessor on the one hand, and the bankrupt, his trustee and estate, on the other hand, be deemed to have been surrendered.'" It is only to that qualified and limited extent, that as regards all third parties it is to be deemed not to be surrendered. Lord Justice *Lush* also considered that in order to prevent absurdity the word

(1) 17 Ch. D. 756.

"surrendered" must be read in a qualified sense. His Lordship said (1): "The section authorizes a trustee to disclaim a burdensome lease of the bankrupt, and if he does disclaim it, the lease is 'to be deemed to have been surrendered on the date of the order of adjudication.'" If the lease had been actually surrendered the lessor would have been deprived of all his rights under it. But the object was to place the trustee in the same position as if the lease had never vested in him, and that is all which is necessary to carry out the intention of the Legislature. Any qualifying words, therefore, which are necessary thus to restrict the operation of the section may be inserted. The object was only to relieve the bankrupt's estate and the trustee from liability, and it was not intended to affect the rights or liabilities of other persons further than was necessary to effect that object."

Then, referring to *Smalley* v. *Hardinge* (2) he says that the point which had arisen in the case before them was not present to their minds when they decided that case, but now that it had arisen their Lordships would still decide *Smalley* v. *Hardinge* in the same way as they had done. Then, when the matter came before the present Lord Chancellor in this very case of the *East and West India Dock Company* (3), his Lordship said, as has been already stated, that he considered the Court ought to look to what would be the best for the bankrupt's estate as to whether he should disclaim or not, and he thought leave to disclaim ought ordinarily to be given notwithstanding there might be considerations which might affect third parties either one way or the other. His Lordship then refers to the judgments of the majority the Judges in *Smyth* v. *North* (4), saying that he is certainly not going to express or intimate any opinion that those judgments were incorrect, and also refers to the judgment of Lord Justice *James* in *Ex parte Walton* (5). Now Lord Justice *James* in the course of the argument in *Ex parte Walton* put this very case, saying of the assignment (6): "Suppose a lessee assigned his lease and then the assignee became bankrupt and his trustee disclaimed the lease, what would be the effect upon the obligation

(1) 17 Ch. D. 757.
(2) 6 Q. B. D. 371; 7 Q. B. D. 524.
(3) See *In re Clarke*, 17 Ch. D. 759.
(4) Law Rep. 7 Ex. 242.
(5) 17 Ch. D. 746.
(6) Ibid. 749.

C. A. 1882 EAST AND WEST INDIA DOCK COMPANY v. HILL. V.-C. H.

of the lessee on his covenants;" and it was admitted that the liability of the original lessor would be unaffected. After reading these various cases over several times, and considering the judgments of the learned Judges therein, I feel that I am not at liberty to say otherwise than that the remedy or, as it is expressed here, the right of the lessor in this case upon the covenants is not taken away by the disclaimer under the 23rd section, but remains. That being so, whether or not the Defendant in this case has either under or irrespective of the statute some right of proof against the bankrupt's estate it is not for me to say; that question is not before me and I give no opinion about it, but I do think as matters stand upon the authorities that I ought to hold that the lessors have a remedy upon their covenants in the original lease. That remedy has not been taken away by statute or by the decisions under the statute. It remains; and therefore the statement of claim in my judgment is rightly founded. I cannot make any distinction between the two portions of the rent. I think myself that the distinction which it has been attempted to draw is not tenable, having regard to the broader ground upon which I rest my whole judgment; therefore judgment will simply be that the demurrer be overruled.

W. W. K.

C. A.

From this judgment the Defendant appealed. The appeal was heard on the 4th of November, 1882.

W. Pearson, Q.C., and *MacSwinney*, for the Appellant:—

The question now for decision was discussed by this Court when leave was given to the trustees to disclaim, but the Court avoided making any declaration respecting it. The lessors claim the rent from the Appellant under the covenant in the lease, which only extended to payment of rent during the continuance of the term. But the term by the operation of the disclaimer is at an end. There is no reason why the words of the 23rd section of the *Bankruptcy Act*, 1869, should not be literally construed, and they expressly provide that the lease shall be deemed to have been surrendered at the date of the order of adjudication. The words of the corresponding sections in the former Acts (6 Geo. 4,

c. 16, s. 75, and 12 & 13 Vict. c. 106), were different. In them the bankrupt, in case the assignee declined to adopt the lease, was to deliver up the lease to the lessor, and on doing so he was discharged from all liability. In that case it was held that the lease was still subsisting, and that the original lessee who had assigned to the bankrupt was not discharged from his covenants: *Manning* v. *Flight* (1). But under the present Act the legal consequences of a voluntary surrender of the lease to the lessor must follow. The rights and liabilities of the underlessee will not be affected because under the 8 & 9 Vict. c. 106, s. 9, on the surrender of the lease the underlessee holds immediately of the lessor: *Smalley* v. *Hardinge* (2); *Ex parte Walton* (3). But the lease itself which was granted to the Appellant is gone: *Ex parte Brook* (4); *Ex parte Stephens* (5); *Ex parte Glegg* (6). If the lessor can still recover the rent under the demise he will have both the land and the rent. It is true that a contrary opinion was expressed by the Court of Exchequer in *Smyth* v. *North* (7), but that decision is not binding on the Court of Appeal, and *Bramwell*, B., dissented from the majority of the Court on this very point. The proper remedy for the lessors if they are injured is to apply to the Court of Bankruptcy to have possession of the property given up to them.

Kekewich, Q.C., and *Latham*, for the Plaintiffs, were not called on.

LORD SELBORNE, L.C.:—

We are all of opinion, looking to the decisions which have taken place under this and the former statutes in various Courts, and the opinions which have been expressed, without determining whether those decisions have been so made as to bind this Court, that they amount to so considerable a mass of judicial opinion expressed in a certain direction as to make it proper, if that is to be overruled, that it should be done by a higher authority.

(1) 3 B. & Ad. 211.
(2) 6 Q. B. D. 371; 7 Q. B. D. 524.
(3) 17 Ch. D. 746.
(4) 10 Ch. D. 100.
(5) 7 Ch. D. 127.
(6) 19 Ch. D. 7.
(7) Law Rep. 7 Ex. 242.

C. A.
1882
EAST AND WEST INDIA DOCK COMPANY v. HILL.
Lord Selborne, L.C.

The only thing that one may safely call clear in this matter is that the construction of the clause in this statute is a matter of considerable difficulty. An opinion has been expressed—I need not say whether in a manner which, if I were forced to determine that point, I should hold absolutely binding upon this Court which is the same tribunal—but an opinion has been expressed in the case of *Ex parte Walton* (1), that as between the original lessor and an underlessee, the lease would not be destroyed by a disclaimer—that the effect of the original lease remains, and is not taken away by the statute. And although I certainly appear myself to have thought that it was not necessary to determine that question for the purpose of that case, yet, as a matter of fact, the Lords Justices did express a deliberate opinion to that effect, and they embodied it in the terms of their order.

The Court of Exchequer in *Smyth* v. *North* (2), undoubtedly with some difference of opinion (but I can hardly reconcile with the present Appellant's argument even the opinion of Lord *Bramwell*, who differed from the rest of the Court), decided a similar question, I think, in the same sense. I will not speak of later decisions, because they really depend upon those authorities; but before those authorities Lord *Tenterden* and the Court of Queen's Bench in *Manning* v. *Flight* (3) had decided, under an earlier Act, which said that not only the assignee disclaiming, but the bankrupt delivering up the deeds, was to be absolutely relieved from all liabilities under the lease, that it operated only as between the persons expressly relieved from liability by the statute and the lessor, and left untouched all other rights which the lessor might have under the contract embodied in the lease against anybody else. I agree that the word "surrender" occurs here, and did not occur in that statute, and that seems to me to be the only clear difference; but in endeavouring to consider whether the undoubted effect of that statute in favour of the bankrupt by the delivery up of the lease to the lessor must not necessarily involve something as between those parties, at all events, tantamount to surrender, I have great difficulty in seeing how it could be otherwise: so that it appears to me that the

(1) 17 Ch. D. 746. (2) Law Rep. 7 Ex. 242.
(3) 3 B. & Ad. 211.

more recent authorities decided on this particular statute were led up to by the previous authorities decided under the statute which preceded it.

I have said that there is, in this case, undoubted difficulty; but on principle it is certainly desirable in construing a statute, if it be possible, to avoid extending it to collateral effects and consequences beyond the scope of the general object and policy of the statute itself, and injurious to third parties with whose interests the statute need not, and does not profess to, directly deal. In many cases which can be supposed, and in this particular case, upon the assumption that the underlease at a peppercorn rent is a subsisting lease, it seems quite manifest that the effect of the statute, if it were construed according to the Appellant's argument, would be to do a great deal more harm to third parties outside the administration of bankruptcy than it can do good to anybody else.

Then it is further to be observed that the words are in several points not very clear, and the expressions "the property of the bankrupt," and "the property disclaimed," which, "if a lease, is to be deemed to have been surrendered on the same date" certainly need a good deal to be supplied by construction as to the consequences which are to follow. What the statute meant as between the persons exonerated expressly and the persons to whom they were liable is clear, but what is to happen as to third parties is certainly not expressed in the way in which I think it might have been expected to be if the same effect had been meant to be attributed to this as would be attributed to a voluntary surrender by a person not a bankrupt, voluntarily accepted by the lessor. Then follow the words which have been several times referred to, "Any person interested in any disclaimed property may apply to the Court, and the Court may upon such application order possession of the disclaimed property to be delivered up to him or make such other order as to the possession thereof as may be just." If a lease is the disclaimed property, any person interested in the lease may apply, and if the Court think it just that the lease should be delivered up it may be delivered up. Suppose that the original lessee, having assigned to a person who becomes bankrupt, is held still liable,

C. A. 1882 — EAST AND WEST INDIA DOCK COMPANY v. HILL. — Lord Selborne, L.C.

as these authorities tend to hold him liable, upon his covenant to the lessor, and being called upon by the lessor to pay his rent, applies to the Court and says, "The bankrupt to whom I made an assignment and his trustee have disclaimed—the landlord holds me liable for the rent, and he therefore is not content as between him and me to treat the lease as at an end, is it not just and equitable that I should have the possession?" If the possession were beneficial, he would have an interest in making that application. I shall not attempt to decide beforehand a question not before the Court, but if it were just that the possession should be delivered up to him, I cannot help thinking that the Court would have sufficient authority and power to do it; and if, as in the present case, that could not be done because there is an underlessee who would have a right to retain possession of the property, still the question only comes to this—who is to prove for the loss in the bankruptcy? I have referred to these, as considerations which have probably influenced the minds of the Judges who have had the question before them, and who have hitherto all concurred in similar judgments and opinions; and, as I say, in that state of things the Court does not consider that it ought now to depart from what has been previously decided, so far as in previous authorities this question has been dealt with.

JESSEL, M.R.:—

Concurring as I do in the observations of the Lord Chancellor, I merely wish to make one remark—that having listened with great attention to the elaborate argument addressed to us, I see no reason whatever, as far as I am concerned, to alter the opinion I have already expressed at considerable length in the case of *Ex parte Walton* (1).

COTTON, L.J.:—

I agree in the judgment expressed by the Lord Chancellor.

Solicitors for Plaintiffs: *Freshfield & Williams.*
Solicitor for Defendant: *Soames.*

(1) 17 Ch. D. 746.

M. W.

LOOSEMORE *v.* TIVERTON AND NORTH DEVON RAILWAY COMPANY.

C. A.
1882
FRY, J.
March 24, 25, 27, 30.
C. A.
Nov. 6, 7.

[1880 L. 1128.]

Railway Company—Compulsory Powers—Entry on Land under s. 85 *of the Lands Clauses Consolidation Act immediately before expiration of the Period allowed for Completion of Works—Right of Company to take Possession without aid of Sheriff—Minerals—Digging by Company—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 68, 85, 91 [*Revised Ed. Statutes, vol. ix. pp.* 642, 648, 650]—*Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 6, 77 [*Revised Ed. Statutes, vol. ix. pp.* 706, 726].

A railway company served a landowner with notice to treat for part of his property before the period of three years limited for the exercise of its compulsory powers had expired. The landowner served a counter-notice requiring the company to take the whole property, and nothing further was done towards ascertaining the compensation. Thirteen days before the expiration of the period of five years allowed for the completion of the works the company entered upon the land under sect. 85 of the *Lands Clauses Consolidation Act*, having previously made a deposit and given a bond as required by that section. After the five years had expired without the railway having been made on the land, the landowner brought his action for an injunction to restrain the company from executing works on the land and from continuing in possession of it:—

Held, by *Fry*, J., that the entry of the company was lawful, and that they were entitled to retain possession, and that the compensation must be assessed under sect. 68 of the *Lands Clauses Act*:

Held, on appeal, that an entry by the company under sect. 85 at a time when it was manifest that the railway could not be made over the land before the expiration of the five years, being an entry not made for the purpose of executing the works under their statutory powers, but of acquiring a possessory title to the land against the landowner, and then making the railway under an ordinary landowner's title, was an abuse of the powers of the Act, and could confer no right upon the company after the expiration of the five years which they would not otherwise have possessed, that the company could not after the expiration of the five years take any steps against the landowner to enforce adversely the notice to treat, and that he was entitled to recover possession:

Held, also, by *Jessel*, M.R., and *Cotton*, L.J., that if the entry under sect. 85 had been rightful, still the right of the company to possession would have ceased at the end of the five years if they had neither become owners of the land nor completed their railway upon it:

Held, by *Fry*, J., that where a landowner refuses to allow a company to enter on land on which they are entitled to enter under sect. 85, but does

C. A.
1882
LOOSEMORE
v.
TIVERTON AND NORTH DEVON RAILWAY CO.

not actually resist their entry, they are justified in entering peaceably without calling on the sheriff under sect. 91 to give them possession:

Held, also, by *Fry*, J., that when an entry is made on lands under sect. 85 in pursuance of a notice to treat, which does not include minerals, if the company remove minerals which it is not necessary to remove for the purpose of constructing the railway, as, for instance, if, when the railway is to be carried on an embankment over the land of one landowner, they dig clay of merchantable value out of that land and use it in works on other land acquired by them, the landowner can maintain an action for damages for the minerals so removed, and is not limited to the remedy given by sect. 6 of the *Railways Clauses Consolidation Act*, 1845.

THIS action was brought to restrain the *Tiverton and North Devon Railway Company* from continuing in possession of certain lands of the Plaintiff upon which they had entered.

The Defendant company were incorporated by "*The Tiverton and North Devon Railway Act*, 1875" (38 & 39 Vict. c. clxv.), for the purpose of making a railway from *Tiverton* to *Morebath*, in the county of *Devon*. The Act received the Royal assent on the 19th of July, 1875. By it the *Lands Clauses Consolidation Acts*, 1845, 1860, and 1869, and the *Railways Clauses Consolidation Act*, 1845, were incorporated with the special Act. Section 39 of the special Act provided, that "the powers of the company for the compulsory purchase of land for the purposes of this Act shall not be exercised after the expiration of three years from the passing of this Act." And by sect. 40, "If the railways are not completed within five years from the passing of this Act, then, on the expiration of that period, the powers by this Act granted to the company for making and completing the railways, or otherwise in relation thereto, shall cease to be exercised, except as to so much thereof as is then completed."

The Plaintiff was the owner in fee of a water mill, dwelling-house, and premises, known as *Tucking Mills*, in the parish of *Bampton*, situate on the eastern side of the River *Batheram*, which flowed there in a southerly direction. The mill was worked by a mill race, which branched from the stream above the mill, and joined the stream again below the mill. Near the house was a garden, lying to the east of the mill waste; and on the west side of the mill race and mill waste, and between it and the river, was a small meadow. To the south and east of that

field there was another larger meadow, on the east side of the mill waste. The house, the mill, the garden, and the small meadow were in the occupation of one *George Cook*. The larger meadow was in the occupation of one *Thomas Miles*. All these premises belonged to the Plaintiff. On the 12th of July, 1878, the company served a notice on the Plaintiff that they required to purchase and take for the purposes of their Act part of his lands as specified in a schedule thereto annexed, being parts of the small meadow and of the mill race. On the 2nd of August, 1878, the Plaintiff served on the company a counter-notice that he would not part with the lands which they required, or with any portion of his lands, unless the company would purchase the whole of his lands and premises as mentioned in a schedule to his notice, being the lands above described.

The company considered this counter-notice to be invalid, and they sent no reply to it. On the 2nd of December, 1878, the Plaintiff sent to the company a second notice, calling upon them to elect whether they would take all or none of the lands referred to in his first notice, and he said that, unless the company so elected within twenty-one days from the date thereof by notice in writing to him, he should consider their silence to mean that it was not their intention to take the whole of the said premises. The company did not reply to this notice, and nothing more was done until November, 1879, when some conversation took place between Mr. *Dymond*, the company's surveyor at *Exeter*, and the Plaintiff about the matter in dispute. A correspondence ensued between Mr. *Dymond* and the Plaintiff, and, ultimately, on the 11th of December, 1879, the company's solicitor wrote to the Plaintiff, telling him that possession of the land for the construction of the railway was urgently required, and sending him a notice of the company's intention to apply to the Board of Trade, under sect. 36 of the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), to appoint a surveyor to determine the value of the land, so as to enable them to take possession thereof under sect. 85 of the *Lands Clauses Act*, 1845. This notice also stated the names of the persons whom they proposed as sureties to the bond which the company would have to give under sect. 85. The Plaintiff, though he stated that he objected to the company's proceedings,

C. A. 1882

LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

did not make any objection to the proposed sureties, or suggest that he desired to be heard before the Board of Trade under sect. 36 of the *Railway Companies Act*, 1867, about the sureties, until in a letter written by him to the company's solicitor on the 18th of March, 1880, after the bond had been executed by the proposed sureties. After this notice was given, the company offered to concur in the statement of a special case for the opinion of the Master of the Rolls. The Plaintiff did not agree to this, and on the 8th of January, 1880, the company applied to the Board of Trade to appoint a surveyor. A surveyor was appointed, and on the 2nd of February, 1880, he made his valuation, finding that the value of the parts of the Plaintiff's lands comprised in the company's notice to treat was £236 10*s.*, and that, if the company should be required to purchase the remainder of the Plaintiff's property which was occupied with that comprised in the company's notice to treat, the value of the whole property so occupied was £636 10*s.* The company sent the Plaintiff a copy of the valuation, and again endeavoured to induce him to come to some settlement of the dispute, but without effect. On the 9th of April, 1880, they deposited the sum of £236 10*s.* in the *Bank of England*, and on the 5th of July, 1880, they gave the Plaintiff notice in writing of their intention to enter on his land, and sent him a bond of the company with two sureties for £236 10*s.* The same day the Plaintiff gave notice in writing to the company's solicitor that he should not allow their engineers to take possession of the land, and that he should resist their taking possession. On the 6th of July, 1880, however, the company's contractors entered on the Plaintiff's land, and took possession of the parts comprised in the company's notice to treat, without any opposition by the Plaintiff, and proceeded to fence off the land of which they had taken possession. The Plaintiff and some men employed by him afterwards removed the fencing which had been erected by the contractors' men, and offered considerable opposition to the company's works, and the company then applied, under sect. 91 of the *Lands Clauses Act*, 1845, to the sheriff of *Devon* to give them possession of the land. Possession was given by the sheriff on the 15th of July, 1880, and the Plaintiff then withdrew and offered no further opposition to the

company. On the 24th of July, 1880, the Plaintiff issued the writ in this action.

By his statement of claim he alleged that the proceedings of the company were invalid, and also that they had dug up and carried away from the land upon which they had entered large quantities of valuable clay against his will. And the Plaintiff claimed an injunction to restrain the company from digging up or excavating or performing any works for the purpose of making or completing their railway, or otherwise in relation thereto, upon such of the Plaintiff's lands as were comprised in the company's notice to treat, or any part thereof, and from continuing in possession of such lands or any part thereof, and damages for the wrongs complained of.

The company delivered a defence and counter-claim. By their defence, they alleged that their proceedings had been regular, and by their counter-claim they claimed damages for the pulling down of their fences by the Plaintiff, and other interruptions to their works caused by him.

It appeared by the evidence that, though the Defendants' line of railway was to be carried upon an embankment over the Plaintiff's land, the Defendants had excavated some clay from his land, and had used it for the purpose of puddling some bridges which they were building on other land which they had acquired. There was evidence that the clay was of some commercial value, though it had not been previously worked. At the trial the Defendants offered to pay £35 damages for the clay which they had thus removed, but the Plaintiff declined to accept that sum.

The action came on for hearing before Mr. Justice *Fry* on the 24th of March, 1882.

Cookson, Q.C., and *F. Roxburgh*, for the Plaintiff:—

The notice to treat did not constitute a contract with the Plaintiff for the sale of the land: *Haynes* v. *Haynes* (1). His counter-notice had, at any rate, put the company at arm's length, and, as they did not reply to his notice of the 2nd of December, 1878, he was entitled to assume that they did not intend to take any of his land. That letter was written in order to meet the

(1) 1 Dr. & Sm. 426.

C. A. 1882

LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

view expressed by Vice-Chancellor *Stuart*, in *Schwinge* v. *London and Blackwall Railway Company* (1), that the landowner must give such notice to the company as would bring the matter to a point. The Plaintiff was, from the silence of the company, entitled to consider the notice to treat as abandoned.

At any rate, the company took possession of the land so near to the expiration of the five years limited by sect. 40 of their Act, that they could then avail themselves of the provisions of sect. 85. Their powers could not be exercised after the expiration of the five years in relation to any part of the railway which was not completed at the end of the five years; and indeed the delay amounted to an abandonment of their powers: *Baker* v. *Metropolitan Railway Company* (2); *Richmond* v. *North London Railway Company* (3); *York and North Midland Railway Company* v. *Reg.* (4); *Shrewsbury and Birmingham Railway Company* v. *London and North Western Railway Company* (5). The price to be paid to the Plaintiff could not be ascertained till after the expiration of the five years, and the entry under sect. 85 is only ancillary to that, and is only to be made when there is an urgent necessity for an immediate entry: *Field* v. *Carnarvon and Llanberis Railway Company* (6). The mere fact that the five years had nearly expired is not sufficient to justify the entry. The agreement with the landowner must be completed within the time fixed for the completion of the works, and this was impossible at the time when the entry was made: *Kemp* v. *South Eastern Railway Company* (7). The company cannot take land for a railway which they have no power to make: *Mulliner* v. *Midland Railway Company* (8).

Again, the company cannot exercise the powers given to them by sect. 85, unless the condition precedent mentioned in sect. 16, has been fulfilled, viz., that the whole of their capital has been subscribed. The Defendants have not proved that this had been done when they entered.

[FRY, J.:—Does sect. 16 cover sect. 85?]

(1) 3 Sm. & Giff. 30, 42.
(2) 31 Beav. 504.
(3) Law Rep. 5 Eq. 352; 3 Ch. 679.
(4) 1 E. & B. 178, 858.
(5) 4 D. M. & G. 115.
(6) Law Rep. 5 Eq. 190.
(7) Ibid. 7 Ch. 364.
(8) 11 Ch. D. 611.

Sect. 16 applies to the compulsory taking of land, and sect. 85 authorizes an entry before any agreement has been made. That is a compulsory taking: *Marquis of Salisbury* v. *Great Northern Railway Company* (1); *Guest* v. *Poole and Bournemouth Railway Company* (2); *Worsley* v. *South Devon Railway Company* (3); *Doe* v. *North Staffordshire Railway Company* (4).

Again, the entry of the Defendants, after the refusal of the Plaintiff to allow them to enter, without the aid of the sheriff under sect. 91, was a forcible and illegal entry, and the Plaintiff is entitled to damages for the injury to his property which was done in the course of the entry: *Beddall* v. *Maitland* (5); *Edwick* v. *Hawkes* (6).

The Defendants gave no notice to treat for the minerals, and therefore by sect. 77 of the *Railways Clauses Act*, 1845, they were not entitled to them. The clay is a mineral, for the evidence shews that it is of some commercial value: *Hext* v. *Gill* (7); *Attorney-General for the Isle of Man* v. *Mylchreest* (8). The Plaintiff is therefore entitled to damages for the clay which the Defendants have removed in a manner which was not necessary for the construction of their line.

The Plaintiff's counter-notice requiring the company to take the whole of his property was a valid notice. The supply of water necessary for working the mill is a part of the mill, and therefore anything which is essential to the maintaining a proper supply of water is a part of the mill: *Furniss* v. *Midland Railway Company* (9). The company ought to have deposited the value found by the surveyor of the whole of the property comprised in the Plaintiff's counter-notice.

Moreover the sureties to the company's bond were not properly approved. Under sect. 85, no doubt, the justices could approve the sureties *ex parte*: *Langham* v. *Great Northern Railway Company* (10); *Bridges* v. *Wilts, Somerset, and Weymouth Railway Company* (11). But by sect. 36, sub-sect 4, of the *Railway Com-*

(1) 17 Q. B. 840.
(2) Law Rep. 5 C. P. 553.
(3) 16 Q. B. 539.
(4) Ibid. 526.
(5) 17 Ch. D. 174.
(6) 18 Ch. D. 199.
(7) Law Rep. 7 Ch. 699.
(8) 4 App. Cas. 294.
(9) Law Rep. 6 Eq. 473.
(10) 1 De G. & Sm. 486.
(11) 16 L. J. (Ch.) 335.

C. A. 1882

LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

panies Act, 1867, the sureties are, in case the parties differ, to be approved by the Board of Trade, "after hearing the parties." This has not been done here.

[FRY, J.:—How is it shewn that the parties differed?]

The correspondence shews that they did.

Davey, Q.C., and *Farwell*, for the company, were not called upon as to the question of forcible entry:—

If a landowner's counter-notice comprises any land which the company is not bound to take, it is bad *in toto*; *Harvie* v. *South Devon Railway Company* (1). The power of entry given to the company by sect. 85, is not confined to a case of urgency, it is given if they are "desirous of entering on and using" lands before agreement or award. The effect of the *dictum* of Vice-Chancellor *Malins* in *Field* v. *Carnarvon and Llanberis Railway Company* (2) is to add words to sect. 85, and it is contrary to the view of Lord *Cottenham*, as expressed in *Willey* v. *South Eastern Railway Company* (3). But, even if the *dictum* was right, there was an urgent necessity for our taking possession, because the five years had almost expired.

At the expiration of the five years we were lawfully in possession of the Plaintiff's land.

[FRY, J.:—How can the company perform the obligation of their bond now that their powers are at an end? If their power to summon a jury is at end, the bond is security, not for the purchase-money of the land, but only for the value found by the surveyor.]

The company having given notice to treat, and having given the bond, have a right to enter, and then, if the landowner is not content with the sum paid into Court, he can compel the company to summon a jury or take the other proper steps to have the purchase-money ascertained. It is his business to set the company in motion. These powers of the company are directory. It has been held that they survive the period of three years: *Kemp* v. *South Eastern Railway Company* (4); *Richmond* v. *North London*

(1) 32 L. T. (N.S.) 1.
(2) Law Rep. 5 Eq. 190.
(3) 1 Mac. & G. 58.
(4) Law Rep. 7 Ch. 364.

Railway Company (1); *Reg.* v. *Birmingham and Oxford Junction Railway Company* (2). The *ratio decidendi* applies equally to the period of five years. The power to summon a jury is given for the benefit of the landowner. It is a duty imposed on the company by sect. 68 of the *Lands Clauses Consolidation Act*, for the benefit of the landowner. He might the day after the notice to treat had been served on him apply for a *mandamus* to compel the company to proceed to ascertain the compensation payable to him: *Pinchin* v. *London and Blackwall Railway Company* (3). It would be absurd to say that he had lost this right by the expiration of the five years. The landowner cannot bring ejectment if the company are in possession after the expiration of the five years: *Marquis of Salisbury* v. *Great Northern Railway Company* (4); *Doe* v. *North Staffordshire Railway Company* (5). It is distinctly said by Lord *Campbell* in the former of those cases, that the power of entry given by sect. 85 is not one of the company's powers of compulsory purchase of land.

There has been no abandonment of the notice to treat by reason of lapse of time: *Ystalyfera Iron Company* v. *Neath and Brecon Railway Company* (6).

As to the removal of the clay, the evidence does not shew that it has any commercial value as a mineral, and we have not used it as a mineral: *Midland Railway Company* v. *Checkley* (7). The Plaintiff can obtain compensation under sect. 6 of the *Railways Clauses Act*, 1845, and sect. 68 of the *Lands Clauses Act*: *Great Western Railway Company* v. *Smith* (8). We have only used the clay in the construction of our works.

[FRY, J.:—Not the works on the Plaintiff's land.]

We are not restricted to that. We could use the earth dug out of a cutting to construct an embankment on the land of another landowner.

[FRY, J.:—In such a case the cutting out is necessary. Here,

(1) Law Rep. 5 Eq. 352; 3 Ch. 679.
(2) 15 Q. B. 634.
(3) 5 D. M. & G. 851.
(4) 17 Q. B. 840.
(5) 16 Q. B. 526.
(6) Law Rep. 17 Eq. 142.
(7) Ibid. 4 Eq. 19.
(8) 2 Ch. D. 235; 3 App. Cas. 165.

C. A. 1882

LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

the line being carried over the Plaintiff's land on an embankment, there was no necessity to cut out anything from his land.]

Sects. 32 & 33 of the *Railways Clauses Act*, do not apply; they apply only to land of which the company is not already in possession.

[FRY, J.:—If the clay is a mineral, you were not in possession of it.]

We are entitled to the damages which we claim by our counterclaim, and this might be set off against the damages for the clay, if the Plaintiff is entitled to any.

Cookson, in reply:—

No authority has been cited which shews that any of the powers which relate to the compulsory purchase of land survive the period of five years. It is said that, if once the company has given a notice to treat within the three years, they can at any time afterwards take any of the other steps necessary for completing the purchase of the land. But the answer is that they have entered into a contract with Parliament to complete their works within five years, and if they cannot do that their powers are all gone, except as to so much of their works as they have completed.

The conduct of the company after the Plaintiff's notice of the 2nd of December, 1878, shews that they had abandoned their notice to treat: *Schwinge* v. *London and Blackwall Railway Company* (1). If the landowner does not accept the notice to treat, the further action lies with the company, not with him.

Sect. 68, properly construed, does not impose any duty on the landowner to take steps to have the compensation ascertained; there is no such duty unless he wishes to be paid for the land which the company proposes to take.

Sect. 68 does not apply to a landowner like the Plaintiff, who disputes the validity of the notice to treat and requires the company to take the whole of his property. It is clear that the company cannot keep the notice to treat hanging over the landowner for an indefinite time; *Richmond* v. *North London Railway*

(1) 3 Sm. & Giff. 30.

Company (1). The view of Vice-Chancellor *Malins*, in *Field* v. *Carnarvon and Llanberis Railway Company* (2), is not really inconsistent with that of Lord *Cottenham*, in *Willey* v. *South Eastern Railway Company* (3). If it is plain that the company cannot complete their works within the five years, there can be no "urgent necessity" to enter under sect. 85, for the entry will not enable them to complete their works over the rest of their line. And the evidence shews that the company had not even entered into contracts for the land required for more than six out of the eight miles of their line.

As to the clay, the effect of sect. 77 of the *Railways Clauses Act*, 1845, is that the subsoil remains in the landowner: *Ramsay* v. *Blair* (4). The clay is clearly a mineral. Sub-sects. 32 & 33 of the Act apply, because the clay is outside the notice to treat, and in entering, the company did not therefore enter upon the clay. They should have given a separate notice if they wished to work the clay: *Poynder* v. *Great Northern Railway Company* (5).

FRY, J.:—

An extraordinary number of points have been suggested on the part of the Plaintiff, and many of them will require consideration at my hands. [His Lordship stated the nature of the Plaintiff's property and the provisions of the company's Act, and continued:—]

On the 12th of July, 1878, and therefore within the three years limited for the exercise of their powers for the compulsory purchase of land, the company served a notice to treat upon the Plaintiff, and on the 2nd of August in the same year the Plaintiff served a counter-notice under the 92nd section of the *Lands Clauses Consolidation Act*, requiring the company to take, not merely the strip of land which they desired to take, but the whole of the mill, the dwelling-house, the garden, and the two meadows. I will say at once that, in my judgment, that counter-notice was not a valid one, because I cannot hold that the larger meadow,

(1) Law Rep. 5 Eq. 352.
(2) Ibid. 190.
(3) 1 Mac. & G. 58.
(4) 1 App. Cas. 701.
(5) 16 Sim. 3; 2 Ph. 330.

C. A. 1882

LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

Fry, J.

that to the south of the mill, was part of the mill. If a grant had been made of the mill and dwelling-house, with all the appurtenances, that field would not have passed as the curtilage, or as in any way appendant or belonging to the house. The argument is, that the mill waste is part of the mill, that the mill waste requires to be cleaned out from time to time, and that therefore the occupier of the mill must have the right of access to both sides of the mill waste, and that, in order to have access to the eastern side of the mill waste, he must have a right to pass over the field which lies on that side. In my judgment that argument cannot be maintained. I think that there is nothing to shew that it is necessary to pass along both sides of the mill waste, and the fact that the two sides were in different occupations is a strong argument the other way. Whether a grant of an easement, or of a right in the nature of an easement, would or would not have been inferred, is not the question. I am clearly of opinion that the larger field would not have passed by a grant of the mill and house. [His Lordship referred to the Plaintiff's notice of the 2nd of December, 1878, and continued:—] It has been suggested on the part of the Plaintiff that that notice meant that he would infer from the company's silence that they intended to take none of his premises, but all I can say is that, if he meant that, he has not said it. It appears to me that the whole validity of that notice (if it has any) depends upon the validity of the counter-notice with which I have already dealt.

Now from that time, December 1878, nothing seems to have been done down to November 1879, and then an interview took place between Mr. *Dymond*, the land surveyor employed by the company, and the Plaintiff, the effect of which it is not necessary to refer to. From that time forward the company were active in endeavouring to get the Plaintiff either to agree to some mode of settling the question between them by a case to be stated for the decision of a Court, or to accept their notice to treat, but he did neither the one nor the other. Matters went on in this way until in January, 1880, the company took steps for obtaining the appointment of a surveyor by the Board of Trade. A surveyor was appointed, who made his valuation or award in February, 1880, and on the 5th of July, 1880, a tender was made to the Plaintiff

of the bond, with two sureties, which the 85th section of the *Lands Clauses Consolidation Act* requires. On the 6th of July the company, as I conclude from the evidence, made a peaceable entry upon the Plaintiff's land, that is, upon the strip which by their original notice to treat they had required.

Now the main question to be decided is this: Was the entry of the company on the 6th of July a valid entry? The company justify their entry under the 85th section, which provides that, subject to their giving the bond which is there indicated, they may enter upon the land. It is said that the company have not complied with the provisions of the 85th section, and upon that head very numerous arguments have been addressed to me.

In the first place, it is said that the 85th section is one of the powers for the compulsory taking of land referred to in the 16th section of the *Lands Clauses Consolidation Act*, which requires that there should be a written contract by the subscribers between themselves to pay up the capital. But, in my judgment, that argument cannot prevail. The 16th section applies to that *fasciculus* of clauses which deals with the taking of lands otherwise than by agreement, and does not govern the 85th section, which is a peculiar and separate provision, or rather one of a smaller group of provisions, giving a right of entry and user independently of the taking or purchase of the land. The view which I entertain upon that point is in exact accordance with the opinion expressed by the Court of Queen's Bench in *Marquis of Salisbury* v. *Great Northern Railway Company* (1).

The next argument is this. It is said, and said truly, that the five years during which the company had the powers granted to them by their Act of 1875 expired on the 18th of July, 1880; that the bond was tendered to the Plaintiff on the 5th of July: that the bond was given by way of security that the company would do all things necessary for effecting the purchase of the Plaintiff's land, and that it was impossible that that could be done within the interval between the 5th and the 18th of July, and that, consequently, the bond was given for an impossible purpose, and was therefore void. That raises the question whether the powers of the company, or the duties of the company, for the

(1) 17 Q. B. 840.

C. A. 1882 — LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO. — Fry, J.

purpose of completing the purchase survived the period of five years. [His Lordship read sect. 40 of the company's Act, and continued:—] A notice to treat had been given to the Plaintiff. Such a notice, according to the cases, establishes between the company and the landowner a relation of a peculiar character, which has been expressed by various terms. It is a relation exceedingly like that of contract, though it does not arise from volition on the side of the landowner. It gives the landowner a right to call upon the company to pay him the purchase-money, to be ascertained in a manner which he shall indicate, either by agreement between him and them, or by arbitration, or by the assessment of a jury to be summoned by them at his instance. It is a relation which binds the company to take and the landowner to give up the land, subject to his right to compensation. So far everything is completed, and the rights of the parties are fixed.

But then it is said that the powers of the 68th section, which are the only powers really in question, are powers of the company, that a power is given to the company to appoint a valuer, and to direct the sheriff to summon a jury, and that these powers have come to an end by virtue of the provision in the special Act. That is the contention. Let me inquire to what extent that would go. Suppose the company had given notice to treat and had entered, and suppose the landowner had, through negligence or from any legitimate ground of excuse, not taken any steps to require the assessment of the purchase-money, is it to be said that the company could remain in possession of the land without paying the compensation money? Their power to agree with the landowner, their power to appoint an arbitrator, their power to summon a jury are all gone. It is said there are no means of assessing the amount. The company are in lawful possession, because under the 85th section they had the right to enter. The result would be that the landowner would be without remedy. Such a conclusion appears to me absurd, and the true view, I think, is this, that the 68th section does not confer on the company powers which come to an end by the lapse of five years, but entrusts the company with powers for the purpose of compensating the landowner for his benefit, and he has the option of requiring the company to put those powers into force. It is

quite true that no authority could be produced precisely in point upon this particular question, whether these powers or duties survive the five years' term. But that they survive the three years' term, although all the company's powers for the compulsory purchase of land have expired at that time, is clear from numerous authorities, and, if such powers survive the three years, it is difficult, in my judgment, to say that they do not survive the five years. However, I prefer to rest my decision on the view that the 68th section imposes on the company an obligation to do certain things at the instance of the landowner, and that obligation is not extinguished by the expiration of their powers at the end of five years.

The next point which has been urged on the part of the Plaintiff is this. It is said that the 85th section can be used only in cases of urgency, and that in the present instance there was no urgency. For that I am referred to the case of *Field* v. *Carnarvon and Llanberis Railway Company* (1). Probably, in the absence of any authority, I should feel great difficulty in coming to any such conclusion as the Vice-Chancellor *Malins* there expressed. The words of the 85th section require only a desire on the part of the company to enter and use the lands, and the very fact of the company exercising the powers given by the section is sufficient evidence of such a desire. But, even if the decision in that case is to be treated as binding on me, I think that in the present case there was that urgency which justified the company in exercising the power. They had given their notice to treat long before, they had been for some time in negotiation with the landowner, inviting him to settle the matter by a reference to a Court of law. No such arrangement had been come to; he had not put in force his right to have the compensation assessed under the 68th section. The result was, that, if they had not entered under the 85th section, they would probably have been unable to obtain possession of this land at all, or at any rate not without great inconvenience. I think, therefore, that, in the exercise of their discretion, they were justified in using the powers conferred on them by sect. 85.

Another argument is this. It is said that the company were

(1) Law Rep. 5 Eq. 190.

C. A. 1882

LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

Fry, J.

bound to pay in the whole of the Plaintiff's demand made by the notice of the 2nd of August, the whole value of the mill, the house, the garden, and the closes of land. The answer, in my judgment, is this, that the company were bound to pay that in, if the counter-notice was a good one; that counter-notice was a bad one, and, therefore, the company were not bound to pay in the whole amount which was demanded.

Then it is said that the 85th section can only be used where there is an existing valid notice to treat, and that in the present case the notice to treat had been abandoned. It is, I think, conceded on the part of the Plaintiff that, in the ordinary course of things, the whole period of five years may be allowed to run without the mere lapse of time working an abandonment of the notice to treat, and in support of that view *Richmond* v. *North London Railway Company* (1), *Kemp* v. *South Eastern Railway Company* (2), and *Ystalyfera Iron Company* v. *Neath and Brecon Railway Company* (3) were cited, all of which tend, to say the least, in that direction.

But, it is said, that in the present case the notice of December has a different operation, and that it required the company to do something more speedily under their notice to treat. Then I ask what were they to do under their notice to treat? They could do nothing, because the landowner had the right to set them in action, and therefore I have great difficulty in seeing how he who had the right to set them in action can complain that they did not act upon their notice. Of course, if that notice had been bad, it would not be any the better for remaining in abeyance. If the counter-notice had been good, the Plaintiff would not have lost the benefit of it, but how a good notice can be said to be abandoned, because the company, who can do nothing under it, do nothing under it, I fail to see.

Lastly, there has been this contention, that the Board of Trade did not hear any objections by the Plaintiff to the sureties, and that, by the 36th section of the *Railway Companies Act*, 1867, they are required to hear such objections. The facts seem to me to be entirely against that contention when it is borne in mind

(1) Law Rep. 5 Eq. 352; 3 Ch. 679. (2) Law Rep. 7 Ch. 364.
(3) Law Rep. 17 Eq. 142.

that the Board of Trade are to hear the objections only if the parties differ. The Plaintiff had notice on the 11th of December, 1879, who the intended sureties were, and he never uttered the slightest expression of dissent, or manifested any desire to differ from the selection of sureties until he wrote the letter of the 18th of March, 1880, when he said he supposed he could be heard before the Board of Trade. But that letter did not reach the Defendants until after the bond had been given by the sureties. So much for the objections under the 85th section.

But then it is said that the Defendants' entry was void for this reason, that the Plaintiff had, before they entered, notified to them that he should refuse to allow their entry, which it is quite plain that he did on the 5th of July, and it is said that, when the landowner refuses to allow the company to enter, they can enter only through the intervention of the sheriff. For that purpose reference was made to the 91st section of the *Lands Clauses Consolidation Act.* [His Lordship read the section.] It is said that that authority carries with it an obligation, and that the company could not enter, except with the assistance of the sheriff. Now, in the first place, the words of the section are very plain, "it shall be lawful," and it has been determined in *Julius* v. *Bishop of Oxford* (1), after great discussion, by the House of Lords, that the words "it shall be lawful" in a statute, mean "it shall be lawful" and nothing more, unless there is something in the context or the circumstances of the case which turns words of permission into words of obligation. In the next place, it is impossible to read the words in sect. 91 as words of obligation, because, if the landowner refuses to permit the entry, the company are at liberty not to enter; they are not under any obligation to summon the sheriff. In my judgment, therefore, the words create an obligation to set the sheriff in motion only where it would be unlawful to enter without his intervention, that is where the entry would be forcible if the company acted upon their right of entry. In the present case all that had been done by the landowner was to refuse to allow an entry, he did not in any way obstruct the company's entry on the 6th of July, he was not there, and he did not come on the ground till the 9th of July,

(1) 5 App. Cas. 214.

C. A. 1882

LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

FRY, J.

and an entry does not become forcible, merely because a person says, I refuse to allow you to enter. In my judgment, the entry was perfectly valid.

The main part therefore of the Plaintiff's case has failed, and I must dismiss the action, except so far as it relates to a matter with which I am now about to deal.

Amongst the complaints which the Plaintiff has brought against the Defendants is a claim for damages for digging clay on his soil, and he alleges that, under the 77th section of the *Railways Clauses Act*, the clay which was dug was a mineral, that it was not necessary to remove it for the construction of the company's works, and that, therefore, the entry by the company was wrongful.

Now, in the first place, it is plain that the removal of the clay was not necessary for the works which were to be done upon the land, because those works consisted of an embankment, and the clay has been dug out, and other materials have been substituted in its place. The next inquiry is, was this clay a mineral within the meaning of the expression "mines of coal, ironstone, slate, or other minerals" in sect. 77. The meaning of the word "minerals" has been ascertained by the case of *Hext* v. *Gill* (1), in which Lord Justice *Mellish* said that "a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." There being no such restrictive context in the present case, the inquiry is, whether the clay which was got out was clay which could be worked for a profit. The Plaintiff and his witness, Mr. *Rowe*, swear that it was a valuable clay. The Defendants' witnesses depreciate the clay, are unwilling to admit that it was worthy of the name of clay, and say that it was of no real value. At the same time it is to be borne in mind that one of the Defendant's witnesses, who perhaps knows more about it than any of them, the contractor, only says that it is of little commercial value. His words are "the clay is, in my opinion, of but little commercial value." That I understand to be a statement that it is of some commercial

(1) Law Rep. 7 Ch. 699, 712.

value, but not of much, and, on the balance of testimony, I have come to the conclusion that this clay, although it does not appear to have been worked before, and although it does not appear to have been worked in the neighbourhood, was nevertheless clay of commercial value, and was therefore a mineral within the meaning of sect. 77.

The Defendants have argued that the compensation for this must be made under the 6th section of the *Railways Clauses Consolidation Act*, which provides for compensation for lands injuriously affected by the construction of the railway, that is to say, that if the railway company enter upon minerals which are reserved to the landowner, and are not theirs, they can say that the owner upon whom they have so entered has been injuriously affected by the construction of the railway. That is not my interpretation of the section. I think that those words refer to injurious affection following necessarily or naturally from the construction of the railway, and not resulting from a trespass committed on a neighbouring landowner's soil for the purpose of obtaining the materials to make the line.

It has been suggested also that under the 33rd section of the *Railways Clauses Act*, the company might enter without any notice. That point, as I understand, was not really finally urged by Mr. *Davey*, and it appears to me that although the company might have entered into possession of the surface of the land, the reserved minerals would not be in their possession. If they required to work them, under the 33rd section they could give the notice to the landowner which is there required, "lands" being by the interpretation clause (sect. 3) extended to "tenements and hereditaments," and a separate stratum of valuable minerals, reserved to a landowner under land taken by a railway company, would be a separate tenement.

The Defendants have offered £35 for the damage accruing from the removal of the clay. The Plaintiff has refused that offer, and I must therefore refer it to chambers to inquire the amount of the damage sustained by the Plaintiff. I desired a note to be taken by the Registrar of the Defendants' offer, because that will no doubt affect the costs of the inquiry, which I reserve.

It remains for me to deal with the costs of the action as a whole.

C. A. 1882 — LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO. — Fry, J.

The Plaintiff has failed upon the substantial part of his case, and he must, therefore, pay the costs of the action as a whole; but, seeing that he has, in my judgment, succeeded on a small part, I shall direct a deduction of £15 to be made from the costs which the Defendants would otherwise be entitled to receive from him, considering that to be an adequate remuneration for the costs which he might have incurred in an action for the mere recovery of damages for the clay, and which might have been, no doubt, tried in the County Court.

I therefore dismiss the action, except so far as it asks for damages with respect to the clay, with the whole of the costs of the action, except the sum of £15. I refer it to Chambers to inquire the amount of the damage sustained by the removal of the clay, and I reserve the costs of that inquiry, with liberty to either party to apply.

Mar. 30. At the request of both parties his Lordship assessed the damages himself. He gave the Plaintiff £30, and gave costs to the company.

W. L. C.

C. A.

The Plaintiff appealed, and the appeal was heard on the 6th and 7th of November, 1882.

The Plaintiff in person in support of the appeal.

By sect. 39 the power of compulsory purchase must be exercised within three years. A notice to treat was given within that period, which ended on the 19th of July, 1878. That notice entitled the company to go on and make themselves owners of the land after the compulsory powers had expired, but it did not constitute a contract. Before there is an enforceable contract which gives the company a title to the land the purchase-money must be ascertained: *Haynes* v. *Haynes* (1); *Wing* v. *Tottenham and Hampstead Junction Railway Company* (2); *Adams* v. *London and Blackwall Railway Company* (3). Now I contend that if at the time when the powers of the company as to the

(1) 1 Dr. & Sm. 426. (2) Law Rep. 3 Ch. 740.
(3) 2 Mac. & G. 118.

uncompleted parts of the line expired, viz. at the end of five years, there was no enforceable contract and the company had no estate in the land, they could not afterwards go on to acquire a title to it. There is no decision on the precise point, but there are cases which serve as a guide. In *Baker* v. *Metropolitan Railway Company* (1) it was held that the company must go on to complete their title within a reasonable time, and cannot keep the notice hanging over a landowner for ever; and in *Richmond* v. *North London Railway Company* (2) it was laid down by the Master of the Rolls, and Lord *Cairns* did not dissent, that they must complete their title within the period allowed for the completion of the works. Here the company entered upon the land thirteen days before the expiration of their powers to make the railway, at such a time that it was impossible for the price to be ascertained or the railway completed before that expiration. *Lamb* v. *North London Railway Company* (3) shews strongly that a company must keep strictly within the limits of its powers. In *Rangeley* v. *Midland Railway Company* (4) and *Kemp* v. *South Eastern Railway Company* (5) an opinion is expressed that the company has only power to take within the time allowed for completion.

Then as to the counter-notice it may be too wide, but yet effect will be given to it so far as it might properly extend: *Falkner* v. *Somerset and Dorset Railway Company* (6).

Again, assuming that the company had acquired the land by purchase, their going on to make the railway upon it after the five years would be an illegal act, and though nobody but the Attorney-General or the shareholders could complain of their doing so if they did not interfere with the rights of other parties, they would be restrained if their carrying on their works was a damage to adjoining property. Thus in *Attorney-General* v. *Shrewsbury Bridge Company* (7) interference with a road after the time for completing the works was restrained. *Cohen* v. *Wilkinson* (8) shews that shareholders could interfere. *Astley* v.

(1) 31 Beav. 504.
(2) Law Rep. 5 Eq. 352; 3 Ch. 679.
(3) Ibid. 4 Ch. 522.
(4) Ibid. 3 Ch. 306.
(5) Law Rep. 7 Ch. 364.
(6) Ibid. 16 Eq. 458.
(7) 21 Ch. D. 752.
(8) 1 Mac. & G. 481.

C. A. 1882

LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

Manchester, Sheffield, and Lincolnshire Railway Company (1) and *Betts* v. *Great Eastern Railway Company* (2) are against the right of the company to go on after their powers have expired. Here the making the embankment on the land injures the adjoining lands.

Then I contend that Mr. Justice *Fry* was in error in holding that sect. 16 of the *Lands Clauses Act* did not apply.

[LORD SELBORNE, L.C.:—We are all of opinion that as that point has not been raised on your pleadings it is not open to you. In proceedings of this nature it is not incumbent on the company affirmatively to allege compliance with all the statutory preliminaries to the exercise of its powers.]

I contend that time may be limited by a counter-notice: *Schwinge* v. *London and Blackwall Railway Company* (3). [The Court intimated dissent from this.]

Then as to entry under sect. 85 of the *Lands Clauses Act*, I contend that the company cannot so enter unless there is a case of urgency: *Field* v. *Carnarvon and Llanberis Railway Company* (4).

[LORD SELBORNE, L.C.:—Can we impose that condition on the exercise of the power when the Act has no words to that effect?]

The power was given to enable the company to go on with its works when it was necessary to proceed with them before a title to the land could be got in a regular way, and to employ this section to enable the company to get a title when it is out of time is a fraudulent use of it. To take possession of land under statutory powers for a purpose which has become incapable of being carried into effect is unauthorised, on the principles laid down in *Shrewsbury and Birmingham Railway Company* v. *North Western Railway Company* (5). Then the company is bound to take the whole property in the counter-notice, or, at all events, the mill, for the notice to treat includes part of the mill race, without which the mill cannot be used: *Furniss* v. *Midland Railway Company* (6).

(1) 2 De G. & J. 453.
(2) 3 Ex. D. 182; S.C. in D. P., 49 L. J. (Ex.) 197.
(3) 3 Sm. & Giff. 310.
(4) Law Rep. 5 Eq. 190.
(5) 6 H. L. C. 113.
(6) Law Rep. 6 Eq. 473.

Davey, Q.C., and *Farwell*, *contrà*:—

We gave notice to treat before the expiration of the compulsory powers, and entered before the expiration of the time limited for making the railway. We do not say that we could have entered after that time for the purpose of exercising our statutory powers.

[LORD SELBORNE, L.C.:—If you proceed to summon a jury to assess the value, are you not exercising a power?]

No, we are only discharging a duty or obligation. To decide against us would enable a landowner to deprive the company of their rights, for he must take the initiative in ascertaining compensation.

[LORD SELBORNE, L.C.:—Under sects. 21, 23, 38 and 39 of the *Lands Clauses Act* it is clear that you could compel the ascertainment of the compensation.]

Reg. v. *Birmingham and Oxford Junction Railway Company* (1) shews that the summoning a jury is a discharge of a duty or obligation, not the exercise of a power.

[JESSEL, M.R.:—It may well be that if the landowner wishes a jury to be summoned the doing so is only a discharge of an obligation, but if the company is summoning a jury as a means to get the land against the will of the landowner, is not that the exercise of a power?]

It is assumed in all the cases that a notice to treat is not considered to be abandoned till the time for completing the works has expired, which involves the view that it can be proceeded upon afterwards. In *Doe* v. *North Staffordshire Railway Company* (2) it was held—(1) that if an entry under sect. 85 is lawful when made, it is not made unlawful by failure to ascertain the price of the land; (2) that proceedings to assess the value are not part of the powers of compulsory purchase; and (3) that under sect. 68 the initiative is with the landowner in proceedings to ascertain compensation. If the summoning a jury is the exercise of a power at all it is the exercise of a power of compulsory purchase, which it cannot be, as it has been held that it can be summoned after the compulsory powers have expired.

(1) 15 Q. B. 634. (2) 16 Q. B. 526.

C. A. 1882 LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

The notice to treat places the parties in such a position that the company has a right to have the land: *Adams* v. *London and Blackwall Railway Company* (1).

[JESSEL, M.R.:—It does not follow that they can take steps for that purpose after the five years. It is their own fault that they did not proceed earlier.]

In *Richmond* v. *North London Railway Company* (2) the company having done nothing beyond serving the notice to treat until after their powers were expired were to be taken to have abandoned their notice. The principles laid down in *Ystalyfera Iron Company* v. *Neath and Brecon Railway Company* (3) help us. It was held that the notice was not to be taken to be abandoned till the expiration of the time for completing the works, and that involves the view that, if not abandoned, it could be acted on afterwards. Here we got legal possession before the expiration of the time for completing the works, and we do not want the powers of the Act to make the railway on the land so acquired. In *Kemp* v. *South Eastern Railway Company* (4) a power to take land by agreement was held to subsist to the expiration of the time for completion of the works. Now, if nothing could be done after the time for completion of the works, the power must be held to expire as soon as it is ascertained that the railway cannot be made within the prescribed period.

When the company have obtained legal possession of the land, the 68th section is the one under which compensation must be obtained, and the earlier sections are not applicable.

[JESSEL, M.R.:—Have you any authority for that?]

In *Marquis of Salisbury* v. *Great Northern Railway Company* (5) the period for exercise of compulsory powers expired without the company having entered, it was held that their subsequent entry was lawful, as not being an exercise of a compulsory power but only a step towards completion. Here our possession was lawful, and we say it never became unlawful.

[LORD SELBORNE, L.C.:—Do you say that if possession is taken

(1) 2 Mac. & G. 118.
(2) Law Rep. 5 Eq. 352; 3 Ch. 679.
(3) Law Rep. 17 Eq. 142.
(4) Ibid. 7 Ch. 364.
(5) 17 Q. B. 840.

under sect. 85 you can retain it *ad infinitum* without paying, unless the owner proceeds under sect. 68?]

That is our contention.

[LORD SELBORNE, L.C.:—That seems rather a startling proposition.

JESSEL, M.R.:—Is there any case which says that if a company has taken possession under sect. 85 and not made the railway, it cannot be ejected when the period for completing the works has expired?]

We contend that when possession is taken under sect. 15 the company are entitled to hold subject only to making compensation under sect. 68.

Then we say that the 40th section of the special Act does not prohibit our going on to make the railway; it contains no prohibitory words.

[JESSEL, M.R.:—Does not the enactment that all the powers for making the railway shall cease amount to a prohibition?

LORD SELBORNE, L.C.:—If you can make the railway without having recourse to the powers of the Act, I think that you are not prohibited.]

That is all we contend for. Then what are the powers as to making and maintaining the railway which are to cease? We say powers which enable the company to interfere with the rights of other landowners. If any other view be taken it comes to this, that after the five years have expired the company cannot do anything on its land. In *Hooper* v. *Bourne* (1) it was held that land had not become superfluous land, because it had not been used, and the time for completing the works had expired. Now, according to the Plaintiff's contention it could not be used, and therefore would be superfluous.

[JESSEL, M.R.:—If a railway has been completed, sect. 40 is out of the case, and the land can be used.]

It is said that our entry under sect. 85 was not *bonâ fide* because we cannot make the railway, but that would apply equally if the Plaintiff had been paid for the land and conveyed it.

(1) 5 App. Cas. 1.

BIBL. LONDIN UNIV.

C. A. 1882

LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

[JESSEL, M.R.:—If the Plaintiff had accepted payment for his land he would stand in a very different position. As it is you are trying to take his land from him against his will under statutory powers.]

LORD SELBORNE, L.C.:—

The facts which need be stated for the purpose of determining this appeal are few. The compulsory powers of the Respondent company for taking land expired on the 19th of July, 1878; and a week before that time the company gave the Appellant notice to take the land, which is now in question, and the possession or use of which by them was necessary for the completion of their railways. According to authorities, cited at the Bar, and not disputed by the Appellant, they might, notwithstanding the expiry of their compulsory powers, have taken steps at any time during the interval between the 12th of July, 1878, and the 19th of July, 1880, to follow up their notice, and obtain a complete title to the land; but they never took any such step. There was no impediment to their so doing, under sects. 21, 23, 38, and 39 of the *Lands Clauses Act*, for, although the Appellant, on the 2nd of August, 1878, had given them a counter-notice, requiring them to take more land if they took any, that counter-notice was never assented to or acted upon by the company; and Mr. Justice *Fry* has held (as far as I can judge, rightly,) that they were entitled to disregard it, as going, at all events, beyond the Appellant's rights. The company's powers "for making and completing the railways or otherwise in relation thereto" came to an end, or (in the terms of sect. 40 of their special Act) were to "cease to be exercised" on the 19th of July, 1880, except as to so much of the line as was then completed. Just thirteen days before that time, on the 6th of July, 1880, they entered on this land under the 85th section of the *Lands Clauses Act;* having taken the first step necessary to enable them to do so nearly seven months before, and having (for some reason which does not appear) allowed about three months to elapse between the surveyor's valuation and the payment of its amount into Court, and about two months more between that payment into Court and the delivery of the necessary bond. The Appellant never assented to the taking of

his land under the company's notice, he did nothing on the footing of the validity of that notice; indeed, there was nothing which he could have done (unless he had desired an arbitration) before the 6th of July, 1880, when the company entered. The railway, of course, was not made upon this land when the company's powers (except as to the completed part of the line), expired on the 19th of July, 1880; and, when they entered under the 85th section, it must have been manifest that this could not possibly be done; and this was land, without the use of which for the purposes of the line, the railways were not, and could not be, completed. The question (in my view) is, whether, under these circumstances, the company's notice could be enforced by them, adversely to the Appellant, and followed up by the steps necessary to transfer the title to his land to the company, under the Act of Parliament, without his consent, when the present action was commenced, on the 24th of July, 1880? Mr. Justice *Fry* decided that question in the company's favour; but with that decision I am unable to agree.

If the question had been untouched by authority, I should have thought it reasonably plain, that the use of land of which possession had been taken under the 85th section of the Act, and also every step necessary to be taken by the company, against an unwilling landowner who had entered into no agreement with them, to transfer his title to themselves by virtue and in consequence of notice given by them under the Act to take that land, would be an exercise of powers, which (whether technically distinguishable from the compulsory powers or not), were granted to the company by their special Act "for making and completing the railways or otherwise in relation thereto;" and the special Act has said that all these powers "shall cease to be exercised" (which must, at least, mean that they shall no longer be exercised by the company at its own will, and for its own benefit), after the 19th of July, 1880. The authorities seem to me to confirm this conclusion. Lord *Hatherley*, in *Kemp* v. *South Eastern Railway Company* (1), said:—"A notice to treat, given by a company, is perfectly good, so long as the company are empowered to carry into effect their works under the Act of Parliament and no

(1) Law Rep. 7 Ch. 372.

C. A. 1882

LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO.

Lord Selborne, L.C.

longer. It may be given the day before the compulsory powers to take the land expire, and then it will last until the time for which that land is wanted, namely, the time for making the works, has also expired, but no longer." He considered, that the same limit of time ought to be implied in an agreement, indefinite in its terms, as to the price at which the company might take from a landowner such lands as might be required for the purpose of its works (as Lord *Cairns* also had previously decided in *Rangeley* v. *Midland Railway Company* (1)). In *Richmond* v. *North London Railway Company* (2), Lord *Romilly*, having to determine the question for what length of time a notice duly given under the *Lands Clauses Act* would continue in force, said:—"The only principle that I can discover, which can have any fixity about it, is to limit the time within which, after giving the notice to treat, the railway company must come to an agreement with the landowner, or must ascertain the price to be paid to him, to the period fixed by the Legislature for the completion of the line." That case was carried to the Court of Appeal, where Lord *Cairns* (though thinking it unnecessary to decide, and not deciding, the point), said (3):—"It might be a very beneficial rule to lay down and I do not say that I differ from the Master of the Rolls as to what should be the rule—that where a railway company is limited in time for taking land by compulsion, and is also limited in time for completing their works, then, if they sleep upon their works, when the time for completion of them has come they should be held disabled from going on with any compulsory purchase."

To distinguish the present case from these authorities it was insisted, that the entry by the company upon the land, before the expiration of the time limited for the completion of the works, was sufficient to give it a title to possession under the Act, and to exclude any inference that the notice was abandoned. None of the authorities, however, have treated the question as depending upon any mere intention on the part of the company to keep, or not to keep, the notice alive; and, in my opinion, it is immaterial whether the company did or did not mean to abandon

(1) Law Rep. 3 Ch. 312. (2) Law Rep. 5 Eq. 359.
(3) Law Rep. 3 Ch. 680.

their notice. The power of entry given to the company by sect. 85 of the *Lands Clauses Act* (under the conditions there mentioned), is given as ancillary to, and for the purposes of, the other statutory powers: it confers no right to possession except for the purpose of making the statutory works under the Act; it does not divest the landowner's title, or (in this case) relieve the company from the necessity of proceeding under the powers given to them "for making and completing the railways, or otherwise in relation thereto," in order to transfer that title to themselves, in the same manner as if they had not entered. It is true that, after such entry, the landowner, if he wishes to compel the company to take the steps necessary for that purpose, may proceed under the 68th section of the *Lands Clauses Act*; but, in the present case, the Appellant preferred to stand upon his own title to the land; which, in my opinion, he had a right to do. For a company to enter under the 85th section, on the eve of the expiration of all its general powers applicable to the land on which it so enters, not for the purpose of making any statutory works under the statutory powers, but for that of acquiring a possessory title to the land, against the landowner, and then making a railway over it not under the Act, but as under an ordinary landowner's title, is, in my opinion, an abuse of the Act, which can confer no right upon the company, after the expiration of their powers, which they would not otherwise have possessed. I think, therefore, that the order under appeal ought to be reversed, and the relief asked by his statement of claim given to the Appellant, with the costs of the action and of this appeal. If, however, he chooses to take an inquiry as to damages, I should be disposed to reserve the costs of that inquiry, till it is seen whether he has suffered any substantial damage, unless the Lords Justices should (in that respect) be of a different opinion.

JESSEL, M.R.:—

The appeal in this case is brought from a decision of Mr. Justice *Fry*, in effect deciding that the Plaintiff, who was owner both at law and in equity of land of which he was in quiet possession, has lost his ordinary rights of ownership. If that is so, it can only be by virtue of the powers conferred by statute on

C. A. 1882 LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO. Jessel, M.R.

the Respondent, the railway company. If the railway company has not become owner, it appears to me that, according to English law, its right to retain possession of the land must be by virtue of some power conferred upon it. The first question then to be decided is whether under the circumstances stated by the Lord Chancellor in his judgment, and which I will not repeat, the railway company has become owner, or entitled to the rights of an owner. If the company has not become so entitled, but claims the right to retain possession of the land by virtue only of a power conferred by the Legislature, then it appears to me that it has no such right, the power having ceased because the railway has not been completed within the period of five years prescribed by the special Act of Parliament. The 5th section of the Act, which contains nothing very special or peculiar, is this:—"Subject to the provisions of this Act, the company may make and maintain, &c., the railways hereinafter described, and may enter upon, take, and use such of the lands delineated upon the said plans, and described in the deposited books of reference as may be required for that purpose." Their right to take lands is only a right to take lands "required for that purpose," *i.e.* for the purpose of making and maintaining the railway. The 40th section provides that if the railways are not completed within five years from the passing of the Act, then, on the expiration of that period, "the powers by this Act granted to the company for making and completing the railways or otherwise in relation thereto shall cease to be exercised, except as to so much thereof as is then completed." As I read the section, the word "thereto" as well as the word "thereof" refers to the railways; and the enactment means this, that after that period the company may exercise all their powers as regards the completed part of the railways, but may not exercise them as regards the non-completed parts.

Has then anything taken place which deprives the Plaintiff of his ownership? First of all, we have nothing whatever except a notice to treat, and an entry under the 85th section. As regards the notice to treat, it was admitted in argument, and in fact it could not be disputed, that the mere giving of the notice to treat did not change the ownership. No doubt it affected the position of the landowner most seriously. It enabled the company to

obtain the ownership of his land on taking the proper steps, and if the company took possession of the land, then no doubt the landowner also could compel it to pay for such land according to the value to be ascertained by a jury. But it did not make the company owner of the land. Now if that peculiar relation which no doubt is formed or created by the giving of the notice does not operate as a change of ownership, which unquestionably it does not, how could the entry under the 85th section effect such change? That section belongs to a totally different class of sections, and is not intended to affect anything more than the occupation of the land. It is one of the group of sections coming under the heading—"And with respect to the entry upon lands by the promoters of the undertaking;" and it enacts that if the promoters of the undertaking shall be desirous of entering upon and using lands before an agreement is made, or an award, or a verdict is taken—that is, if they want them earlier than the period fixed for ascertaining the price, then they may enter and use on certain terms. But for what purposes? They can only use for the purposes of the Act; that is, for making the railway. This entry and user do not deprive the landowner of his ownership of the land, though they do for a time deprive him of the right to the possession of it.

As regards the operation of the 85th section I entirely concur with what the Lord Chancellor has said, though perhaps I go a little further. I entirely agree that the power given by it like every other power conferred on a public body, must be used fairly, or, as it has been called, *bonâ fide*, and with a view to carrying out the objects of the Act. It is not a proper user of it to make an entry on the land, not for the purpose of constructing the works within the period limited by the powers of the Act, but with a view of acquiring a right of ownership or a right equivalent to a right of ownership, with the idea of constructing the works under that right or *quasi* right after the period limited by the Act for the construction of the works has expired. I should say that an entry made under such circumstances was not rightly made, and could confer no further title on the company than the company had before, which, as I have already said, was not in my opinion a right of ownership.

C. A. 1882 — LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO. — Jessel, M.R.

If that be so, there is nothing more that need be considered for the decision of this case. But there is a point to which the Lord Chancellor did not refer, and as to which I desire to express my opinion, viz., supposing the entry had been rightfully made, what would have happened after the thirteen days? It appears to me that then the right of retaining possession of the land would have come to an end. There is no right to enter and use, except for the purposes of the Act. It is not merely entering that is authorized, it is entering and using. If the company cannot use, it seems to me that it cannot retain possession against the landowner. Before the expiration of the thirteen days the answer of the promoters to the landowner, assuming the entry to have been lawful, would have been, "We are going to use the land and we shall make the railway in time—wait and see." But when the time limited for making the line has expired he says:—"You cannot do that for which alone you had a right to take my land and for which alone you had a right to deprive me of the possession of my land, and your right to retain possession has therefore ceased." It seems to me that both at Law and in Equity that would be an answer to any claim set up by the company to retain possession of the land after the powers had ceased.

This being so, it seems to me that there is no defence whatever against the Plaintiff's claim; that the powers of the company, whatever they were, had come to an end before he brought his action, and that he is entitled to the relief which has been mentioned by the Lord Chancellor.

COTTON, L.J.:—

In this case the railway company claim to retain the Plaintiff's land without any contract or agreement with him, and to use it for the purpose of making their railway.

Before this writ in this action was issued the five years had expired, as to which the 40th section provided that if the railways were not completed within that time, the powers granted to the company for making and completing them should no longer be exercised. Before that time, notice to treat had been given, but nothing more had been done before the expiration of

the five years, except to enter under the 85th section of the Act.

It is not necessary in this case to decide what is the effect of sect. 40 as regards the right of the company, where they are owners of the land, to go on and make and complete works on that land if they are not interfering with any rights of the public or of individuals in a way which they cannot do without parliamentary authority. I do not say that where they are owners of land and can complete their railway upon it without interfering with public rights or with the rights of individuals, anybody except perhaps the shareholders or the Attorney-General, could stop them from going on and as landowners completing their works on the land which they have already acquired under the powers of their Act. But here, in my opinion, they have not made themselves owners of the land under the powers of their Act (I shall deal presently with the argument that they have done so), and if that is so then undoubtedly they cannot go on completing their railway or holding land for that purpose without the exercise of the powers granted by their Act; and under sect. 40 those powers have expired.

It was argued by Mr. *Davey*, that having regard to what had occurred, the railway company had put themselves into possession as owners or with the rights of owners of this property. It was not contended, and could not be successfully contended, that the notice to treat had that effect, but it was said that the notice to treat, followed as it was by entry under the 85th section of the *Lands Clauses Act* within the period of five years, had put them in the position of being entitled to hold the land, with no right whatever on behalf of the Plaintiff except a right to have a sum paid to him for the price of the land, with possibly a lien upon it till that was paid, and reliance was placed on sect. 68 of the same Act.

Now, undoubtedly land which is taken under sect. 85 has been decided to be—and I think rightly—land taken within the meaning of sect. 68, so as to give the landowner who has not been settled with as to compensation and price a right under sect. 68 to make his demand and get the sum which he demands if the company do not go to a jury. But one must see how the

C. A. 1882 LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO. Cotton, L.J.

word "take" is used here. "If any party shall be entitled to any compensation in respect of any land or any interest therein which shall have been taken for or injuriously affected by the execution of the works"—There lies the contrast—a contrast between land that is actually taken possession of by the company and intended to be permanently used, and land of which no possession is taken by the company, but which is injuriously affected by the works of the company on other land. If here the Plaintiff had said: "You have taken this land intending to use it for the purposes of your railway, and permanently occupy it for that purpose" and had gone on under sect. 68, I am far from saying that he would not have been entitled, even after the expiration of the five years, to insist on and get the price paid to him which he demanded or which might be settled. But that does not decide that as against him the railway company are entitled to say, "We have, by what we have done, made ourselves owners of this land, so that subject to the payment of the price we can do upon it whatever, as owners of land, we can do without interfering with the rights of others." For the purpose of seeing whether they have or have not made themselves owners we must look at sect. 85.

I assume for the purposes of my judgment, that the entry upon the land at the time when it was made may be considered as *bonâ fide*. I do not in any way differ from what was said by the Lord Chancellor that where entry is made nominally for the purpose of exercising the statutory powers, but really without any such intention, such an entry could not be held to be lawful. But assuming the entry to have been lawful, does the possession of the company continue lawful after the expiration of the five years? If it does not, can it be said that the railway company have by that entry, although lawful in the first instance, a right to be considered, either as entitled to possession of the land, or as owners of the land under this Act of Parliament?

I should say here that it cannot possibly be contended (for there is nothing in the Act upon which such an argument can be founded) that by entry under sect. 85, the property in the land has gone from the owner and vested in the company. The utmost that can be said is, that under this section they have a

right to retain possession, and to get out of the landowner under some of the other clauses in the Act, the legal estate which still remains in him.

Now for what purposes can the entry be made. The Master of the Rolls has very much anticipated what I proposed to say upon that. The right of entry is given for the purpose of enabling the company to exercise, more rapidly than they could otherwise do, their statutory powers of making and completing their railway. Sect. 85 undoubtedly speaks of using the land; but sect. 85 and sect. 84 go together, and we find in sect. 84 the express words "enter upon any land which shall be required to be purchased or permanently used for the purposes and under the powers of this or the special Act." And wherever user of the land is referred to either in sects. 84 or 85, that must be introduced. The user for which they can take possession under sect. 85, is user for the purposes of and under the powers given by the Act, and as against the will of the landowner they cannot, in my opinion, in any way exercise that right of entry under sect. 85, except for the purpose of taking the land in order to use it under the exercise of the powers given by the Statute under which they are acting. When those statutory powers are at an end (and it is clear under sect. 40 that they are at an end, so far as statutory power and not ownership is relied on to enable them to go on) then there is no right given by sect. 85 in any way to use or to retain the land. It is not, indeed, said expressly that they are to give it up, but where they are acting, not as owners, but as persons having taken possession of the land against the will of the owner, as soon as the purposes for which they are authorized to take possession are at an end, and have become impossible, then, in my opinion, there is no restriction whatever on the right of the owner to demand his land, and to apply to any proper Court in order to prevent the company from continuing there, and to have himself revested in possession of it. That, in my opinion, is the answer to the arguments on sect. 85.

Assuming that if the railway had been completed the company could have made themselves absolute owners of the land by following out the notice to treat, it is clear that at the time when the five years expired the railway was not in any way completed,

C. A. 1882 LOOSEMORE v. TIVERTON AND NORTH DEVON RAILWAY CO. Cotton, L.J.

and in my opinion, they had no right to retain this land—not theirs but that of the Plaintiff—for the purpose of making their railway when they had no statutory power enabling them to make that railway.

In my opinion, therefore, even assuming that the entry upon the land was lawful and justified by the Act, yet, when the purposes for which they had a right of entry and possession came to an end, then the right of the landowner to obtain possession of his land, and to restrain them from going on with any of their works, became absolute.

In my opinion, therefore, the Plaintiff is entitled to a decree. I agree with what the Lord Chancellor has intimated that if there is to be an inquiry as to damages, the costs of that must be reserved.

The Plaintiff wishing for an inquiry as to damages, such inquiry was directed. An injunction was granted restraining the company from carrying on any works on the land, and in lieu of an injunction restraining the company from continuing in possession an order to deliver up possession within six months.

Solicitor for Plaintiff: *C. M. Stretton.*
Solicitor for Company: *R. R. Nelson.*

H. C. J.

BLACKBURN BUILDING SOCIETY *v.* CUNLIFFE, BROOKS, & CO.

C. A. 1882 Nov. 8, 9.

[1881 B. 188.]

Building Society—Borrowing Powers—Overdrawing Banker's Account—Deposit of Deeds—Rule in Clayton's Case.

23 Ch D 46.

A benefit building society which had no power to borrow money, were permitted by their bankers to overdraw their account to a large amount; and in 1876 a memorandum of agreement was signed by the officers of the society and confirmed by the directors stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe custody but as a security for the balance from time to time due. In 1881 an order for winding up the society was made, and the bankers claimed to retain the deeds as security for the balance of their account. No evidence was given as to the application of the money which was advanced by the bankers; but the solicitors on both sides signed an admission that some part was applied in payment of members withdrawing from the society and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property:—

Held, that the overdrawing of the bankers' account was *ultrà vires*, being a borrowing unauthorized either by the rules or the objects of the society, and therefore that the bankers had no lien on the deeds either under the agreement or by the course of dealing with the society; but that they were entitled to hold the deeds as a security for such part of the money advanced by them as had been applied in payment of the debts and liabilities of the society properly payable and had not been repaid to the bankers; but that in ascertaining what had been so applied the bankers could not rely on the rule in *Clayton's Case* (1).

Held, also, that the admission by the solicitors of the society that some part of the money had been applied in payment of lawful expenses was sufficient to entitle the bankers to a declaration and an inquiry as to the amount so applied.

In re Cork and Youghal Railway Company (2) followed.

THIS was an appeal from a judgment of the Vice-Chancellor of the county palatine of *Lancaster*.

The *Blackburn and District Benefit Building Society* was a society established under 6 & 7 Will. 4, c. 32, the object being declared to be to assist its members to erect or purchase freehold, copyhold, or leasehold property, or to enable them to invest their contributions upon interest.

(1) 1 Mer. 572.

(2) Law Rep. 4 Ch. 748.

C. A. 1882

BLACKBURN BUILDING SOCIETY v. CUNLIFFE, BROOKS, & Co.

The rules were in the main similar to those of other building societies. There was no rule either expressly authorizing or expressly forbidding the borrowing of money by the society.

The 3rd rule provided that any member of the society should be allowed to withdraw (provided the funds permitted) sums not exceeding £10 by giving seven days' notice and sums exceeding £10 by giving one month's notice.

The 19th rule authorized the directors to make any special arrangements as to advances and the repayment of advances.

The 47th rule was as follows: "An account shall be opened in the names of the trustees with such bankers as the directors shall determine from time to time. All money received shall be paid into the bank when it amounts to £10. All payments shall be made by cheque on the bankers signed by one trustee or two directors, and certified by the secretaries."

In January, 1874, an account was opened in the names of the trustees with Messrs. *Cunliffe, Brooks, & Co.*, bankers at *Blackburn*, who were the Defendants in this action.

The society was at first allowed an overdraft of £3000, and they deposited with the Defendants the deeds relating to certain properties belonging to borrowing members, but no memorandum accompanied the deposit.

The overdraft increased considerably, and in the early part of 1876, the society requiring an increased overdraft, it was agreed that the Defendants should permit an increased overdraft to the amount required, on the officers of the society giving a guarantee that the overdraft should be reduced to £10,000 within a certain time, and that the society should give the Defendants a written memorandum making the deeds deposited a security for the balance due.

It was also arranged that the Defendants should charge only 1 per cent. above bank rate on the first £3000 and £5 per cent. on any additional sum, but such total overdraft was not to exceed £25,000.

This guarantee was accordingly given, and the society were permitted to increase their overdraft.

On the 27th of September, 1876, the following memorandum

was signed by the solicitors and secretaries of the society, and indorsed on the register of mortgages:

"*Blackburn and District Benefit Building Society.*

"The deeds and writings enumerated in this book, and which were from time to time deposited in the bank of Messrs. *Cunliffe, Brooks, & Co.*, are so deposited not only for safe custody, but also as a lien to secure the sum or sums of money which shall from time to time be owing by the said *Blackburn and District Benefit Building Society* to the said Messrs. *Cunliffe, Brooks, & Co.*, on balance of banking account.—Dated this 27th day of September, 1876."

A notice of this memorandum and of the negotiations which led to it was entered in the minutes of the directors, and all that was done received the sanction of the directors.

In the month of March, 1877, the overdraft had been reduced to £4000, and the guarantee of the officers of the society was given up.

The operations of the society were very large, the receipts during the year 1880 being £44,032 11*s.* 4*d.*, and the amount withdrawn from the society during the same period being £37,857 11*s.* 5*d.*

On the 23rd of July, 1881, a petition was presented for winding up the society, and a winding-up order was made on the 25th of October, 1881, and official liquidators were appointed.

At the date of the presentation of the petition the balance due to the Defendants on the account was £2734 3*s.* 3*d.*, which sum was reduced before the commencement of the action to £1302 6*s.* 5*d.*, principally by repayments by borrowing members of the society of sums advanced on the security of their deeds.

The action was brought by the official liquidators claiming a declaration that the deeds deposited with the Defendants were the property of the society, and were not subject to any lien of the Defendants, and asking that they might be delivered up to the Plaintiffs; and further asking that all moneys received by the Defendants from borrowing members of the society since the presentation of the petition might be repaid by the Defendants.

The Defendants in their defence claimed a lien on the deeds to the extent of the balance due to them.

C. A. 1882

BLACKBURN BUILDING SOCIETY v. CUNLIFFE, BROOKS, & Co.

No evidence was given of the application of the money from time to time drawn out by the society; but before the trial the following admission was signed by the solicitors of the parties:

"We admit, from an examination of the pass-book containing the account of the Plaintiff society with the Defendants, from January 1881 to the present time, that the application of the sums advanced by the Defendants were in some instances made for the payment of members who had given notice of withdrawal, and the balance in payment of salaries of officers or legal expenses or expenses in connection with mortgaged colliery and other properties which the Plaintiff society had entered into possession of."

The action was tried before the Vice-Chancellor of the Duchy of *Lancaster*, and on the 24th of March, 1882, His Honour gave judgment for the Plaintiffs on their claim to have a declaration that the Defendants were not entitled to any lien or charge on the papers, and ordered them to be delivered up to the Plaintiffs; but held that the Defendants were not bound to refund the moneys received by them from the borrowing members since the filing of the petition (1).

(1) March 24, 1882. Mr. BRISTOWE, V.C., after stating the facts of the case, said:—

No evidence was given at the hearing as to how the money from time to time overdrawn at the bank was applied, but an admission was entered into by the solicitors on both sides to the following effect, that the applications of the sums advanced by the Defendants were in some instances made for the payment of members who had given notice of withdrawal, and the balance in payment of salaries, legal expenses, and other expenses in connection with mortgaged colliery and other properties which the society had entered into possession of. That is a most unsatisfactory statement, and I cannot rely upon it as shewing in any way that the advances made can be traced to any particular payments. At the date of the memorandum of the 27th of September, 1876, there were various deeds and documents belonging to the society, and forming the securities upon which money had been lent to so-called advanced members, which were deposited with Messrs. *Cunliffe, Brooks, & Co.*; and those deeds and documents were from time to time changed as mortgages were paid off, and fresh securities were deposited as fresh loans were entered into. At the time when the winding-up petition was presented numerous deeds and documents belonging to the society as mortgagees of the properties to which they related were so deposited. Under these circumstances I have now to decide what was the effect of the memorandum of the 27th of September, 1876, and what are the respective rights of the liquidators (as representing the society) on the one side, and Messrs. *Cunliffe, Brooks, & Co.* on the

It was agreed that the deeds should be given up at once, and £1500 paid into Court by the Plaintiffs pending the appeal.

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other side. In my judgment, it is clear that the directors of the society had full power to deposit with their bankers for safe custody the deeds and writings relating to the properties mortgaged to them. But had they power to give or create any lien, mortgage, or charge upon those deeds as security to the bankers for "the sum or sums of money which shall from time to time be owing by the society to their bankers on balance of banking account?" It is obvious that if they had that power, and could exercise it to the extent of £25,000, there would be an end of all difficulty about the rules not containing any power to borrow money, for the directors might borrow to any extent to which the bankers would allow an overdraft, and the bankers, having the security of the memorandum of lien or charge, and receiving interest at the rates mentioned in the minutes of the 12th of October, 1876, would not be particular what amount was overdrawn or to what purpose the overdraft was applied. On the part of the official liquidators it is contended that, inasmuch as no power to borrow was conferred by the rules, the memorandum of the 27th of September, 1876, was entirely *ultrà vires*, and that the persons who signed it—they appeared to have been the secretaries and solicitors of the society—though acting under the resolution of the directors, who adopted and confirmed what they had done, had not and could not have the power to mortgage or charge the property of the society with the payment of moneys from time to time advanced by the bankers of the society; that, in fact, having a running overdraft with a covering security, was neither more nor less than borrowing, which was contrary to the principles on which societies such as those were constituted and was illegal, as decided in *Laing* v. *Reed* (Law Rep. 5 Ch. 4) and *Ex parte Williamson* (Law Rep. 5 Ch. 309), and other cases which have been referred to.

It was further contended that this case did not fall within the principle of the well-known decisions of the *German Mining Company's Case* (4 D. M. & G. 19) and the *Cefn Cilcen Mining Company* (Law Rep. 7 Eq. 88) and *Waterlow* v. *Sharp* (Law Rep. 8 Eq. 501), but rather falls within the principle to be gathered from the observations of Lord Justice *James* in *In re Professional Commercial and Industrial Benefit Building Society* (Law Rep. 6 Ch. 856). On the part of Messrs. *Cunliffe, Brooks, & Co.*, it was on the other hand maintained that this case was neither more nor less than an ordinary banking transaction, large and varying in amount no doubt, but resulting in this, that on an account extending on an average to a yearly turnover of £50,000, there was, after a five years' account, an overdraft of £2734 only; further, that the society and all its members were by the yearly reports made fully aware of the overdrafts from time to time, that all the money found by the bank was applied strictly for the purposes of the society, and that the society, being duly authorized to have a banking account, must be bound by what, in the ordinary conduct of bankers' business in such a case was sure to take place—namely, that the bankers would at times allow overdrafts, and that such overdrafts must be a charge upon all securities

C. A. 1882

BLACKBURN BUILDING SOCIETY v. CUNLIFFE, BROOKS, & Co.

The Defendants appealed from this judgment, and the Plaintiffs gave cross-notice of appeal against such part of the judgment

of the customer deposited with their bankers; that in fact it was within the power of the society by its officers to give the memorandum of the 27th of September, 1876, and that both by such memorandum and by the common custom and right of bankers they were entitled to retain the securities of their customer to satisfy the overdraft or balance due from the customer to them.

It was further argued that under any circumstances, as the money which was drawn from the bank was expended for the purposes of the society, the bankers would be entitled to follow the money and to have the benefit of it by taking the securities which had been paid off by their money, relying again on the principle of the *German Mining Company* (4 D. M. & G. 19) and the *Cork and Youghal Railway Company* (Law Rep. 4 Ch. 748), and the very recent decision of the Appeal Court in *Chapleo* v. *Brunswick Permanent Building Society* (6 Q. B. D. 696), especially the judgment of Lord Justice *Baggallay*. Lastly, it was argued that at any rate, on the principle of *Wilson's Case* (Law Rep. 12 Eq. 521), there could be no power to direct the bankers to give up any securities held by them, but that they not seeking to enforce any equitable relief were entitled to hold their security for whatever it was worth. In my judgment, after carefully considering the able arguments addressed to me on both sides and the cases above referred to, I have come to the conclusion that the contention of the Defendants is not well founded, and that the Plaintiffs are entitled to judgment on the main points. Of course I do not for a moment question the authority of *In re Cefn Cilcen Mining Company* (Law Rep. 7 Eq. 88), *In re German Mining Company*, and *In re Cork and Youghal Railway Company*, but I think they are not applicable to the present case. [His Honour then referred at some length to those cases, and continued:—] Then again the *Cefn Cilcen Mining Company* and *Waterlow* v. *Sharp* (Law Rep. 8 Eq. 501) were very different from this case; in each of those cases it was held, and in my judgment rightly held, that there was no proper borrowing or loan in the strict sense, and that was the *ratio decidendi* in each case. Here, on the contrary, in my judgment, a case of distinct borrowing and lending is established. It is not the case of an ordinary banker's overdraft, but it is a case in which bankers not being willing to allow an overdraft without security, attempt to take and seek to rely upon a distinct and definite security from persons whom they knew to be trustees but believed to be capable of giving them a security, but who, in fact, had no authority to give such security. The rate of interest was stated, the commission fixed, and everything intended to be a complete loan transaction. In my judgment such a transaction was wholly *ultrà vires*, and, there being no power to borrow, the security given for money so borrowed and to be borrowed was invalid, and could not be enforced or relied upon as effective for any purpose whatever. But it was said, on the authority of *Wilson's Case* (Law Rep. 12 Eq. 521), that Messrs. *Cunliffe, Brooks, & Co.* having in fact advanced money to the society, and having possession of the deeds and documents deposited with them by the society, were entitled to hold such

as refused to declare the Defendants liable to refund the moneys paid in by the borrowing members since the date of the winding-up petition.

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deeds and documents until payment of the sum advanced by them. In my judgment, this case is not governed by the authority brought forward. In the case referred to the transaction was not one likely to raise any suspicion in the mind of the lender. On the contrary, in the present case, Messrs. *Cunliffe, Brooks, & Co.* must be taken in my judgment to have known the whole circumstances. They were appointed bankers pursuant to one of the rules of the society, and they must be taken to have had full notice of such rules, and that the society had no power to borrow. They knew that the deeds and writings mentioned in the memorandum of the 27th of September, 1876, were deposited with them for safe custody on behalf of the society, but they sought to hamper that deposit by a declaration not given by the society, and not authorized by its rules, which, in my judgment, was wholly *ultrà vires* and void, professing as it did to give them a charge on such deeds and documents to secure advances made by them. It has been strongly urged upon me that the case fell entirely within the decision of the learned Judge who decided *Wilson's Case* (Law Rep. 12 Eq. 521). I cannot say that I have not felt some difficulty as to the effect of *Wilson's Case*, but in my judgment that case stood upon its own peculiar circumstances, and does not govern this.

It was further urged that irrespective of *Wilson's Case* altogether Messrs. *Cunliffe, Brooks, & Co.* having once obtained a deposit of the deeds and documents in question could not be dispossessed of them except upon payment of the amount due to them on the overdraft. That was to some extent repeating the proposition already made, but in my judgment it is sufficient to state the proposition to shew that it could not be correct. It was further said that the society and all its members had by means of the annual reports and balance sheets, received full notice of what was done, and were barred by acquiescence. In my judgment that contention also fails. There had not been any such acquiescence as to preclude the liquidators asserting the rights put forward by them in the action. On the whole therefore, I come to the conclusion that the Plaintiffs were entitled to the relief prayed by them in the first three paragraphs of the prayer in their statement of claim, namely, a declaration that the title deeds deposited with the Defendants were the property of the society; that the Defendants were not entitled to any lien or charge upon them, and that they should be ordered to be delivered up and to pay the costs of the action.

There remains, however, one point which must be mentioned, namely, the relief asked for in the 4th paragraph, that an account must be taken of money paid by borrowing members in respect of certain deeds since the petition was presented to the Court (which deeds have been handed over to the members by the Defendants), and that the Defendants should be ordered to pay such sum to the society. In my judgment no relief ought to be granted to the Plaintiffs in respect of this matter. What took place was this. After the 23rd of July, 1881,

C. A.
1882
BLACKBURN BUILDING SOCIETY v. CUNLIFFE, BROOKS, & Co.

Rigby, Q.C. (*Buckley*, with him), for the Defendants:—

The society in this case had no borrowing powers; but on the other hand they were not expressly restrained by any of their rules from borrowing. Therefore the sole restriction upon the directors was that they should only incur such obligations as were within the objects for which the society was established. They could not carry on the business on borrowed capital, but they were entitled to run into debt for the legitimate expenses of the society. The direction in the rules to pay all the money into a banker's, authorized the directors to deal with the bankers in the ordinary way, and it is the universal custom of country bankers to allow their customers to overdraw. Such overdrawing would not have been a borrowing even if borrowing had been forbidden by the rules: *Laing* v. *Reed* (1); *In re Cefn Cilcen Mining Company* (2), *Waterlow* v. *Sharp* (3). *Looker* v. *Wrigley* (4) is distinguishable, for it was decided on a special case, in which it was expressly stated that there was a loan from the bankers to make increased advances by the society to their members, which was clearly beyond the powers of the society. In the present case the money was required partly for expenses incurred on pro-

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the date of the winding-up order, various advance members of the society owing in the aggregate £1431, were desirous of redeeming their securities, and they from time to time applied to the consulting actuary for his certificate under the rule of the society as to the amount then due from them. Having obtained such certificate, and the proper authority from the secretary, they applied to the bankers who had the custody of the deeds to have their deeds delivered to them on payment of the amount certified to be due from them. The bankers in the usual course of business and pursuant to the rules, received those moneys, placed them to the credit of the societies account and delivered up the deeds in the ordinary way. It was said that this was done without the privity or consent of the Plaintiff society, but that was not so. All was done in the regular transaction of the business of the society, and it is clear in my judgment that the transactions were perfectly proper and regular. Therefore I do not see that the relief thus sought ought to be granted. I make no order upon that part of the case. There must be a declaration that the title deeds were the property of the society, and that the Defendants are not entitled to any lien or charge upon them, and an order that they must be given up; also that the Defendants must pay the costs of the action.

(1) Law Rep. 5 Ch. 4.
(2) Ibid. 7 Eq. 88.
(3) Ibid. 8 Eq. 501.
(4) 9 Q. B. D. 397.

perty of which the society were mortgagees in possession or other necessary outgoings, and partly for payment of withdrawing members. Even if the overdraft was in itself *ultrà vires*, the bankers are entitled to stand in the place of the creditors so far as the money has been expended in paying the liabilities of the society: *In re German Mining Company* (1); *In re Cork and Youghal Railway Company* (2).

Ince, Q.C., and *T. Snow*, for the Plaintiffs, were only called upon as to the last point raised by the Defendants:—

This point was not raised by the defence. No evidence was given of the application of the money overdrawn, and no case has been raised for an inquiry. The admission entered into by the solicitors on both sides is quite insufficient for this purpose. If the Defendants are entitled to any allowance on this ground, it will only be for the money expended on the ordinary outgoings. The payments to withdrawing members were unjustifiable; for they were only entitled to payment if there were surplus funds available, and they ought not to have been paid out of borrowed money. The bankers cannot take advantage of the rule in *Clayton's Case* (3).

With respect to the cross appeal, all the sums paid into the bankers by borrowing members after the presentation of the petition, which was the commencement of the winding-up, were invalid under the 153rd section of the *Companies Act*, 1862.

Rigby, in reply.

LORD SELBORNE, L.C., delivered the judgment of the Court (Lord *Selborne*, L.C., *Jessel*, M.R., and *Cotton*, L.J.), as follows:—

In this case the Court are of opinion that there ought to be a different order from that which has been made by the Vice-Chancellor of the Duchy of *Lancaster*. We are not at all sure that we proceed upon any grounds of law from which the Vice-Chancellor of the duchy would himself have dissented, if he had thought that, in the state of the evidence before him, there was

(1) 4 D. M. & G. 19. (2) Law Rep. 4 Ch. 748.
(3) 1 Mer. 572.

C. A. 1882

BLACKBURN BUILDING SOCIETY v. CUNLIFFE, BROOKS, & Co.

a case for inquiry. The general principles applicable to a case of this description are, we think, sufficiently well settled. There can be no doubt that where there is an express prohibition against borrowing, it must be obeyed. There is also no doubt, that where there is not an express prohibition against borrowing in a case of a company or a society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes. Now, in this case there is no borrowing power, nor can it be said that a borrowing power generally can be necessary for the purposes of the business of this society; therefore it is not upon the footing of an incidental or expressed power to borrow, that anything can be allowed in this case. When the documents are looked at, in which the agreements between this society and their bankers, the Appellants, are embodied, it is perfectly apparent, that a course of dealing was contemplated and agreed upon between the bankers and the society, which was not authorized by the rules of the society; and, consequently, that any benefit of the securities which were in the hands of the bankers at the time of the winding-up, to which they may be legitimately entitled, is not founded upon those agreements, or upon that course of dealing; that, so far as it depends upon the agreements and the course of dealing which was regulated by the agreements, the bankers are wrong, and the burden of shewing that they are entitled to anything lies upon them, and not upon the other side. But there is an equitable principle, consistent with the law of which I have spoken, sound in itself, and also sufficiently established by authority, which may entitle them, nevertheless, to some benefit from their securities; and if the facts of the case give them the benefit of that equitable principle, it is consistent with justice and with authority to say that irregularity of either the form or the substance of their course of dealing shall not stand in the way of the justice due to them. That was established, to mention one authority only, in the case of *In re Cork and Youghal Railway Company* (1), before this Court of Appeal; where it was held, in respect to that class of securities which were called *Lloyd's* bonds, that although

(1) Law Rep. 4 Ch. 748.

they could in themselves constitute no indebtedness as against the company issuing them, yet, nevertheless, they might be so far evidence of a contract between the company and the persons holding them, sufficient to entitle the holders to that security or right of repayment which the company might lawfully have given them under the actual circumstances of the case if that form had not been adopted. And I think the consistency of the equity allowed in the *Cork and Youghal Railway Company's Case* (1) with the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shewn in this way. The test is: has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing. Well, applying that in the present case we think that, as far as it can be made out that the moneys which were advanced by the bankers simply went to pay the legitimate debts and liabilities of the society, the bankers ought to have the benefit of their security; but that the burden of proving this lies on them; and that, in satisfying that burden, they cannot have the benefit of the rule established in *Clayton's Case* (2), which is simply applicable where a person who had a right to appropriate moneys received as he pleased is shewn to have appropriated them in the manner appearing by his books. Nor can they have the benefit of the doctrine that a pass-book

(1) Law Rep. 4 Ch. 748. (2) 1 Mer. 572.

C. A. 1882

BLACKBURN BUILDING SOCIETY v. CUNLIFFE, BROOKS, & Co.

passing to and fro is evidence of a stated and settled account; because if the directors of this society could not borrow money, they could not ratify an illegal borrowing simply by returning a pass-book.

The order which we think ought to be made I will presently state; but it would be right, before concluding, to observe upon the difference which does exist between us and the learned Judge in the Court below. That learned Judge thought, and in our opinion rightly, that in a case of this sort the burden of shewing that the benefit of the security could be claimed, not on the footing of the apparent course of dealing, but on the footing of the use that was made of the money, lay on the bankers. With that we agree; but the learned Judge thought that burden not satisfied, because there was no evidence before him as to the application of the money in detail, or as to any particular items, except admissions mutually agreed upon; in which it was said, that, of this money, some part was applied in some way, and some in another way, without specifying any further particulars. Now, with great respect to the learned Judge, we think that was rather too narrow a view to take of the matter, when it is remembered that an inquiry would have followed if some items had been regularly proved, and that the account could not have been taken in that stage of the cause. That being so, what is the meaning of admissions of that kind? Surely, the natural interpretation of them is, that the parties intended to save the expense of going into formal evidence to lay the foundation for an inquiry or an account; and when they admit that the items if they were looked into would be found to divide themselves into particular classes, we think that is a sufficient foundation for directing an account.

We propose to make this order:—Reverse the order appealed from, and remit the case to the Duchy Court, with the following declarations and directions: Declare, that at the date of the petition to wind up the society the Appellants were entitled to hold the title-deeds and documents in the pleadings mentioned as a security for repayment of so much, and so much only, of the moneys advanced by them from time to time to the society as were applied in payment of the debts or liabilities of the society properly payable, and had not been subsequently repaid to the Appellants, if at the time

aforesaid anything which had been so applied still remained due. Direct an inquiry whether at the date of the petition to wind up any and what sum was due from the society to the Appellants in respect of moneys so advanced and so applied as aforesaid, and whether and what moneys belonging to the society were afterwards received by the Appellants, and whether any, and if any what, sum now remains due to the Appellants in respect of money so advanced and so applied as aforesaid; and declare, that in making such inquiries, and for the purpose thereof, the Appellants are to be charged with all sums received by them on account of the society since the time when the society last ceased to have any balance standing to its credit in its account with the Appellants, and that they are not to be allowed any sums advanced by them to the order or on account of the society since the same time, which were applied by the society in making payments to withdrawing members, or in any other manner except in payment of such debts or liabilities of the society properly payable as aforesaid. If, on the result of such inquiries, it should appear that any sum is now due from the society to the Appellants, direct payment to them thereof out of the fund now in Court. If it shall appear that nothing is now so due, and that since the date of the petition to wind up the Appellants have received moneys belonging to the society, which at the time when they were so received were not properly applicable according to the foregoing declarations in payment of any amount then due from the society to the Appellants, or which exceeded the amount, if any, so applicable, direct payment by the Appellants of the money so received by them, or of so much thereof as may not have been applicable as aforesaid, to the Respondents, the official liquidators of the society. The Appellants to have the costs of the suit and this appeal, if it shall appear that anything is now due to them having regard to the foregoing declarations and directions, and to pay all such costs of the Respondents, the official liquidators, if it shall appear that nothing is so due.

Solicitors: *Marsland*, agents for *Addleshaw & Warburton, Manchester; Danger, Liverpool.*

M. W.

C. A.
1882
V.-C. B.
May 6.
C. A.
Nov. 9.

In re RIDLER.
RIDLER *v.* RIDLER.

[1881 R. 861.]

Fraudulent Settlement—Intent to defeat or delay Creditors—13 *Eliz. c.* 5 [*Revised Ed. Statutes, vol. i., p.* 627.]

In 1872 *R. R.* gave to the *W. Bank* a guarantee to secure the balance due from his son *R. H. R.* on his banking account to the extent of £1000. On the 25th of May, 1877, *R. H. R.*'s account was overdrawn by £1515. On that day *R. R.* made a voluntary settlement of a leasehold property worth £200 a-year, which he held at a rent of £3 10*s.* His only other property was furniture worth less than £200, and a debt of £1500 due to him from *R. H. R.* In 1880 *R. H. R.*, whose account was then overdrawn by £1313, went into liquidation and paid a dividend of 3*s.* in the pound. There was some general evidence that *R. H. R.* was solvent at the date of the settlement. *R. R.* having died, the *Bank* took proceedings to set aside the settlement and to have the leasehold treated as assets of *R. R.* in a suit for administration of his estate in which the *Bank* had been admitted creditors for £1000 on the guarantee:—

Held, by Vice-Chancellor *Bacon*, that the settlement was valid against creditors, as there was no evidence that it was made with intent to defeat or delay creditors.

Held, by the Court of Appeal, that the settlement was not a settlement for value within the meaning of 13 Eliz. c. 5, the doctrine of *Price* v. *Jenkins* (1) not being applicable to cases under that statute.

But *held*, reversing the decision below, that the settlement was invalid as against creditors, for that under the circumstances the liability under the guarantee ought to have been regarded as a substantial one; that *R. R.* had no right to treat the £1500 due from *R. H. R.* as a good debt; that the settlement must therefore be looked upon as a settlement of all his property, leaving him nothing out of which he could meet his liability under the guarantee, and that an intention to defeat or delay creditors must be inferred.

IN 1872 *Richard H. Ridler* was a customer of the *Worcester City and County Banking Company*. On the 31st of December, 1872, his father, *Richard Ridler*, gave the *Bank* a written guarantee for payment of the balance which should for the time being be owing by *R. H. Ridler* to an amount not exceeding £1000. At this time the balance due was above £700, and it shortly afterwards was considerably increased.

(1) 5 Ch. D. 619.

On the 25th of May, 1877, the balance due on *R. H. Ridler's* account being at that time £1515 12*s.* 1*d.*, *Richard Ridler* assigned a leasehold property to his son *F. W. Ridler*, upon trust for *R. Ridler* for life, with remainder in trust for *F. W. Ridler*, and the settlor's daughter *Ellen Maria Ridler*, during their joint lives, and after the decease of either in trust for the survivor. This leasehold was of the annual value of about £210, and was held by the settlor for the residue of a term expiring in 1893, at a yearly rent of £3 10*s.* The settlor's only other property consisted of furniture worth between £100 and £200, and a debt of £1500 due to him from *Richard H. Ridler*. It did not appear that he had any debts or liabilities other than the guarantee.

In February, 1880, the *Bank* sued *R. H. Ridler* for his balance, which then amounted to £1337, and for £400 due on a promissory note. *R. H. Ridler*, in July, 1880, filed a petition for liquidation, and a composition of 3*s.* in the pound was accepted by the creditors. The *Bank* proved for £1771, and *Richard Ridler* for £1929.

In the same month the *Bank* commenced an action against *Richard Ridler* on his guarantee. On the 24th of November, 1880, *Richard Ridler* died leaving a will. A decree was made in the actions of *Ridler* v. *Ridler* for the administration of his estate, and the *Bank* were admitted as creditors for £1000 with interest from the date of the writ in their action and costs of that action.

On the 1st of November, 1881, the *Bank* obtained liberty to attend proceedings in the administration action, and at their instance inquiries were added to the judgment what real or leasehold estate the testator was entitled to at his death, and as to incumbrances upon it, and an inquiry whether the testator settled or purported to settle any and what leasehold estate, and whether such settlement was void against the *Bank*, or any other creditors of the testator.

F. W. Ridler deposed that at the time of the execution of the settlement *R. H. Ridler*, who was a farmer, was in solvent circumstances and in good credit, and well able to pay the £1500 which he owed to the testator, and that neither the deponent or the testator suspected that there was any likelihood of his getting into difficulties and becoming unable to meet his liabilities. He

C. A. 1882 *In re* RIDLER. RIDLER *v.* RIDLER.

went on to say that the testator had given to *R. H. Ridler* £1200 for his advancement, and made the settlement *bonâ fide* for the purpose of giving *F. W. Ridler* and his sister an equivalent benefit and without any idea of defrauding any persons having claims upon him.

The Chief Clerk expressed his opinion that the settlement should be supported on two grounds: (1) that the *Bank* were not creditors in the strict sense of the term at the date of the deed, and (2) that there was nothing to shew that the testator in executing the deed was actuated by any intention of defrauding them or any other of his creditors. He accordingly certified that the settlement was not void against the *Bank* or any other creditors of the testator.

A summons by the *Bank* to vary this certificate was adjourned to be heard by Vice-Chancellor *Bacon* in Court on the 6th of May, 1882.

C. H. Turner, for the summons:—

The case is governed by the decision in *Townsend* v. *Westacott* (1). The settlor there being largely indebted made a voluntary conveyance, and became insolvent within three years. The conveyance was held to be fraudulent within the statute of the 13 Eliz. c. 5, and it was held not necessary to prove that the settlor was in a state amounting to insolvency at the time. This case was remarked upon and followed by Vice-Chancellor *Malins* in *Crossley* v. *Elworthy* (2).

[BACON, V.C.:—But has not this point as to a settlement of leaseholds been decided by the Court of Appeal?]

The case of *Price* v. *Jenkins* (3) in which Lord Justice *James* expressed a doubt whether an assignment of leaseholds in which the lessee is under any liability, can be voluntary, may be distinguished. There the grantee himself was one of the children of a former marriage, which might have been held to raise a consideration. The deed here is expressed to have been made from natural love and affection, and it contains no express covenant on the part of the grantee to pay the rent.

(1) 2 Beav. 340. (2) Law Rep. 12 Eq. 158.
(3) 5 Ch. D. 619.

Hemming, Q.C., and *Yate Lee*, for the Respondents:— C. A.

1882

In re RIDLER. RIDLER *v.* RIDLER.

The Court must be satisfied that a fraud was intended by the settlor.

Price v. *Jenkins* (1) was followed by the Chief Judge in Bankruptcy in *Ex parte Doble* (2).

They were stopped by the Court.

Turner, in reply.

BACON, V.C.:—

I desire to speak with the greatest respect of the decision in *Price* v. *Jenkins*, and whenever it is necessary for me to follow that case I shall do so, but it is new to me that a leasehold interest of a property which is subject to a rent raises a valuable consideration because it is transferred to a trustee. That may be so, but it is not on that that I have to act in this case, the general scope of the statute being that voluntary transfers of the property of a man, the object of which is to defeat his creditors, are void under the statute, but in no other case, unless fraud is to be inferred from the very nature of the transaction. I have no right to say that this donation by the father is voluntary because it is gratuitous, and that therefore it must be a fraudulent transfer. I can say no such thing, and I think that on the facts before me it would be against the words and against the authority of the statute to say this is a fraudulent transfer. In my opinion, therefore, the summons must be dismissed.

J. B. D.

The bank appealed, and the appeal was heard on the 9th of November, 1882. C. A.

Davey, Q.C., and *C. H. Turner*, for the appeal:—

The Chief Clerk went on two grounds, that the father owed no debt in the strict sense of the word at the date of the settlement, and that there was no proof of intent to defraud creditors. The Vice-Chancellor adopted only the latter ground. It may be that there is no proof that the idea of defeating or delaying

(1) 5 Ch. D. 619. (2) 26 W. R. 407.

C. A. 1882 *In re* RIDLER. RIDLER *v.* RIDLER.

creditors was present to the settlor's mind, but the law holds a man to have intended everything which is the necessary consequence of his acts: *Townsend* v. *Westacott* (1); *Spirett* v. *Willows* (2). In *Freeman* v. *Pope* (3) Lord *Hatherley* distinctly lays down that the Court is not to speculate as to what is passing in the settlor's mind, but will take him to have intended to defeat or delay his creditors if that was the necessary effect of the settlement. There need not be a debt actually due, the intention will be inferred if a man settles nearly all his property when he is embarking in a risky course of dealing: *Crossley* v. *Elworthy* (4); *Mackay* v. *Douglas* (5); *Ex parte Russell* (6). The settlor here being surety for his son could not consider the debt due to him from the son a safe debt. It is argued that the settlement was for value, because the trustee took on himself the liability to the rent of the leasehold, and *Price* v. *Jenkins* (7) was relied on, but that was a decision under 27 Eliz. c. 4, and does not apply to 13 Eliz. c. 5. *Ex parte Hillman* (8) is against applying the doctrine of *Price* v. *Jenkins* to cases under other statutes. The Vice-Chancellor was in our favour on this point.

Hemming, Q.C., and *Yate Lee*, *contrà*:—

In all these cases the question is one of fact: was the settlement made *bonâ fide*, or made with an intention to defeat or delay creditors? No doubt there are cases where the Court has inferred such an intention on the ground that the necessary effect of the settlement was to defeat or delay creditors. We do not dispute *Townsend* v. *Westacott*, but there the word "necessary" is repeated again and again; it is not enough that the settlement may have the effect alleged; it must according to that as well as the other authorities be the necessary consequence.

[JESSEL, M.R.:—Do you dispute the law as laid down in *Freeman* v. *Pope*?]

Not at all; but that judgment like every other must be read with reference to the facts which were present to the mind of the

(1) 2 Beav. 340; 4 Beav. 58.
(2) 3 D. J. & S. 293.
(3) Law Rep. 5 Ch. 538.
(4) Ibid. 12 Eq. 158.
(5) Law Rep. 14 Eq. 106.
(6) 19 Ch. D. 588.
(7) 5 Ch. D. 619.
(8) 10 Ch. D. 622.

Court. The language used by the Court in a case where there were present debts does not apply to a case where there are only contingent liabilities which very likely may never ripen into debts. Take the case of a man who has put his name to a bill for a large sum on which *Rothschilds* are the parties primarily liable. If *Rothschilds* failed could it be said that a settlement which had been made by him before their failure was made to defeat or delay creditors.

[LORD SELBORNE, L.C.:—Where the prospect that the person subject to the liability will be called upon is so remote that it would not enter into any one's calculations, I do not say that the existence of the contingent liability would make a settlement bad. For instance, if a person had taken shares in the *Glasgow Bank* at a time when everybody believed them to be a valuable property, it would be difficult to hold that a settlement made by him while the bank was in good credit was invalid though the liability ultimately turned out ruinous.]

Here there is strong general evidence that *R. H. Ridler* was solvent when the settlement was made, and if he was so the father had assets beside the leasehold to an amount abundantly sufficient to meet his liabilities. The Court will take judicial notice of the state of the agricultural interest during the last few years, which removes any presumption that a farmer who was insolvent in 1880 was insolvent in 1877.

[LORD SELBORNE, L.C.:—The father knew that the *Bank* would not trust the son without a guarantee from him, so he could not assume for this purpose that the debt due to him from the son was a good debt.]

That guarantee had been given years before: *Price* v. *Jenkins* (1) and *Ex parte Doble* (2) support the view that this was a conveyance for value.

[JESSEL, M.R.:—Can *Price* v. *Jenkins* apply to the statute 13 Eliz. c. 5?]

The question whether a transaction is for value or voluntary must be the same under both statutes. Then, again, the settlor

(1) 5 Ch. D. 619. (2) 26 W. R. 407.

C. A. 1882

In re RIDLER. RIDLER *v.* RIDLER.

retained a life interest, which must be taken into account in estimating his assets.

LORD SELBORNE, L.C. :—

The arguments on behalf of the Respondents turned much on the proposition that when a person is liable on a guarantee he is not to be regarded for the present purpose as owing a debt of that amount, without taking into account the assets of the principal debtor as well as his own. There is a fallacy in this. To hold that a guarantor can make a voluntary settlement of the whole of his property and support it by shewing that when he made it the person guaranteed had assets enough to pay the amount guaranteed, would go far to defeat the contract of suretyship. We must look at the matter as if the event had already happened the possibility of which the parties must have had in contemplation when the guarantee was given of the debtor being unable to pay. I do not think that any close inquiry as to the supposed capacity of the person guaranteed to pay the debt ought to be entered into. I do not say that there might not be a state of things in which the liability of the guarantor might be so remote that it need not be regarded; but if he conveys away all his property by a voluntary settlement I think it doubtful whether the settlement could in any case be supported in the event of his ultimately being called on under his guarantee. Here the son had no margin of property beyond what was employed in his farm and what he had borrowed from the bank, for which the bank would not give him credit without a guarantee. I think that he had not assets to such an extent as to prevent the father's liability under the guarantee from being a serious and substantial one at the time when the settlement was executed.

Unless, then, we are to enter on a speculation as to what the son's capacity for payment was at the time of the execution of the settlement, we can only consider the state of the father's assets. They consisted of a debt of £1500 due to him from the very person for whom he had given the guarantee, and furniture not exceeding in value £200. The debt due from the son cannot be looked upon as an available asset for meeting the liability on a guarantee given for the son.

It is urged that as the son, even after several years of agricultural depression, paid a dividend, the debt due from him must be considered as having been of substantial value at the time of the settlement; that the life interest retained by the father must be taken into account, and that taking them together the father retained assets more than sufficient to meet the liability in the guarantee. I think that this argument cannot prevail. The statute speaks not only of defrauding, but of delaying or hindering creditors. Now a voluntary settlement of this kind would certainly tend to delay or hinder creditors, even if we took the sanguine view of the settlor's assets which was urged at the Bar. The father when he made the settlement must have known that if the son could not pay the balance to the *Bank* he himself, if the settlement was sustained, would have substantially nothing available to meet the liability under the guarantee but such dividend as he could get from the son's estate. I am of opinion that a settlement made under such circumstances cannot be supported against the creditors.

JESSEL, M.R.:—

I am of the same opinion, and will only add a word as to my observations upon *Price* v. *Jenkins* (1) in *Ex parte Hillman* (2). I give no opinion whether I should have come to the same conclusions as the Judges who decided *Price* v. *Jenkins*. Treating that case as well decided, I think it has no bearing on cases under the statute 13 Eliz. c. 5. That statute excepts from its operation estates and interests conveyed "upon good consideration and *bonâ fide*." What was the meaning of "good consideration" in that exception. It could not mean that if some obligations attaching to the property went to the new owner in exoneration of the settlor that made the conveyance, a conveyance for valuable consideration. Consider the consequences of such a proposition. Suppose a man transfers £10,000 worth of railway shares or bank shares which are not fully paid up, is that prevented from being a voluntary transfer by the mere fact that the transferor is exonerated from the liability to calls, and the transferee becomes subject to it? If a man makes a settlement

(1) 5 Ch. D. 619. (2) 10 Ch. D. 622.

C. A. 1882 *In re* RIDLER. RIDLER *v.* RIDLER.

of a large freehold estate along with a small leasehold, is the settlement made for valuable consideration within the meaning of this statute because the grantee becomes liable to the rent of the leasehold in exoneration of the settlor? Whatever may be held under the statute 27 Eliz. c. 4, the undertaking the liability to rent is not a good consideration within the meaning of the statute now before us.

COTTON, L.J :—

I also am of opinion that *Price* v. *Jenkins* (1), which was decided upon the construction of another statute, has no bearing on the present case. It had been decided under the statute 27 Eliz. c. 4, that a voluntary conveyance, though honestly and fairly made, was fraudulent as against a subsequent purchaser from the settlor. *Price* v. *Jenkins* qualified that doctrine, and decided that the grantor's undertaking the liability for rent was sufficient to support a settlement which was open to no objection but that of being voluntary. It is a decision of this Court, and we have not to consider whether it was right or wrong, for we are bound by it, but it has no bearing on a case under 13 Eliz. c. 5, where the question is whether a settlement was made with intent to defeat or delay creditors. A man who makes a settlement without leaving himself enough property to pay his creditors must be considered to do it with an intent to defeat or delay them, and a conveyance of leaseholds made for no consideration cannot be brought within the exception in the statute by the mere fact that the grantee becomes liable for the rent.

Then as to the point that the settlor was not indebted, but only subject to a liability which might never become a debt. A man is not at liberty to take a sanguine view, but is bound to act upon a reasonable view of what is likely to happen. In the circumstances of this case, any reasonable man must have looked upon this guarantee as one which would probably be enforced, and the settlement must be taken as made with intent to delay or hinder creditors.

Solicitors: *Chester & Co.; Routh, Stacey, & Castle.*

(1) 5 Ch. D. 619.

H. C. J.

In re INDIAN, KINGSTON, AND SANDHURST MINING COMPANY.

C. A. 1882 Nov. 10.

Practice—Security for Costs of Appeal—Delay in making Application—Appellant out of Jurisdiction.

An application for security for costs of an appeal must be made promptly. As a general rule it is too late if it is made when the appeal is in the paper for hearing. But the Court will take into account special circumstances.

Where a motion for security for costs and the appeal came into the paper on the same day, and it appeared that notice of appeal had been given in the Long Vacation, and that the motion for security had been delayed by reason of the Court not having sat to hear such applications on the usual day, the application was granted.

Semble, the Court will be more strict in enforcing promptness where the application is on the ground of poverty than where it is on the ground of the appellant being out of the jurisdiction.

A PETITION was presented for the winding-up of the *Indian, Kingston, and Sandhurst Gold Mining Company (Limited)*, in which charges of fraud were made against *Jeremiah Ryan*, who moved to have the paragraphs containing the charges against him struck out for scandal.

The motion was heard by Mr. Justice *North*, who refused the application. *Ryan* appealed from this decision. His notice of appeal was dated the 7th of September, 1882, but there was no evidence when it was served on the Petitioner.

The appeal was set down in the ordinary course, and was in the paper for hearing on the 10th of November, when it stood seventh in the list of appeal motions. In the meantime, on the 4th of November, the Petitioner gave notice of motion for the 8th of November, which was a day appointed for hearing motions, that the Appellant should give security for costs.

The Court did not however hear motions on the 8th of November, and this motion also came into the paper on the 10th of November. If the Court had heard motions on the 8th of November the motion for security for costs would have been in the paper, but the appeal would not have been in the paper, being too low down on the list.

C. A. 1882

In re INDIAN, KINGSTON, AND SANDHURST MINING COMPANY

Seward Brice now moved for security for costs, on the ground that the Appellant was out of the jurisdiction of the Court.

Buckley, for the Appellant :—

This motion is made too late. It is only made when the appeal motion is in the paper for hearing. All the costs have been incurred, and there can be no security for past costs: *Grant* v. *Banque Franco-Egyptienne* (1); *Mayor of Saltash* v. *Goodman* (2).

JESSEL, M.R. :—

If I accede to this application it is not from any desire to shew favour to these applications, for they ought not to be encouraged. With respect to *Grant* v. *Banque Franco-Egyptienne* I do not understand that Lord Justice *James* intended to lay down any definite rule, and I should be sorry to do so myself. Since the passing of the *Judicature Acts* it has been my usual custom to attend the Court of Appeal when hearing interlocutory motions, and I have heard a great number of applications of this kind; and the Court has always considered itself free to exercise its discretion in a reasonable way. I agree with Lord Justice *James* that in *Grant* v. *Banque Franco-Egyptienne* the application was too late. The notice of motion was not served till the appeal was actually in the paper. And it is to be observed that the motion was refused without prejudice to any application with respect to future costs.

There are some general principles on which the Court ought to act in such cases. In the first place the applicant must give notice with promptness, having regard to all the circumstances of the case; and if the motion is not made till the day on which the appeal motion is in the paper for hearing, as a general rule it will be too late. But in some cases the applicant cannot help it; for it sometimes happens in the case of interlocutory appeals that they come into the paper in the very week in which notice of appeal is given. Then again, it has never been held to be unreasonable delay not to give such notices in the Long Vacation, when probably the solicitors and counsel are away. Therefore it is clear that special circumstances must be taken into account.

(1) 1 C. P. D. 143. (2) 43 L. T. (N.S.) 464.

In the present case, we do not know when the notice of appeal was served. Mr. *Buckley* said that we ought to presume it was served soon after the 7th of September, on which day it was dated; but we cannot make any such presumption. It is said that notice of the application might have been, at all events, served for the 2nd of November. But everybody knows that no substantial business is done on that day. Then it is urged that this application only came into the paper to-day, when the appeal motion is also in the paper. But the application for security would have come on last Wednesday, the 8th, if the Court had taken that class of business as usual on that day, while the appeal would not have been in the paper on that day, not being high enough on the list. So that it was the act of the Court which prevented this application from being heard before the appeal came into the paper.

I think, therefore, that in this case the application is not too late, and the Appellant ought to pay £20 into Court as security for costs; and the appeal motion must stand over. There is this additional reason for ordering security in this case, that the object of the appeal is to strike out allegations for scandal; there is no property in dispute, so that all that the respondents have any real interest in is the costs. And all that they have to look to is the personal liability of the Appellant, who is out of the jurisdiction. I mention these facts, though the ground of my decision is that the applicant has not disregarded the rule that he must come in reasonable time.

COTTON, L.J.:—

Except for the question of delay there would have been no doubt that security for costs would be as of course, the Appellant being out of the jurisdiction, and there being no property in dispute to which the Respondent can look for his costs.

With respect to the question of delay; as a general rule, if a respondent does not use such diligence that his application for security is in the paper before the appeal is in the paper he is too late. The delay which has happened in the present case might have been too great if the application for security had been on the ground of poverty. In such a case it is a great hardship to allow the

C. A. 1882 *In re* INDIAN, KINGSTON, AND SANDHURST MINING COMPANY.

appeal motion to come into the paper; the Appellant may have paid his solicitor and counsel, and after doing so may not be able to comply with the order to give security for costs. But here the ground of the application is that the Appellant is out of the jurisdiction, and, considering all the circumstances, I do not think that the applicant has been guilty of such delay as to preclude him from succeeding, although, if the application had been on the ground of poverty, it might have been a sufficient reason. Considering that it was a mere accident that the motion was not heard before the appeal came into the paper, I think we ought to order security to be given.

Solicitors: *W. B. Styer; Linklater & Co.*

M. W.

C. A. 1882 *Nov.* 10.

In re EAGER.
EAGER *v.* JOHNSTONE.

Practice—Service of Writ out of Jurisdiction—Rules of Court, 1875, *Order* XI., *r.* 1.

The old practice as to service out of the jurisdiction is no longer in force. No leave to serve a Defendant out of the jurisdiction can be given except in the cases specified in Order XI., r. 1.

THIS was an application by the Plaintiff for leave to serve a writ of summons in an action on the sole Defendant out of the jurisdiction.

The action was brought by an infant for the administration of the real and personal estate of *E. R. Eager*, and, if necessary, for appointment of a new trustee. The Defendant was trustee and executor of the will, and was charged with breaches of trust.

The will was proved by the Defendant in *Ireland;* the whole of the estate belonging to the testator, which was worth about £10,000, was situate in *Ceylon.* The Defendant was a British subject resident in *Scotland.* The Plaintiff, who was residuary legatee and devisee, lived in *England.*

The Plaintiff applied for leave to serve the writ on the Defen-

dant in *Scotland*, but Mr. Justice *Day*, the Vacation Judge, before whom the motion was made, refused the application.

Willis Bund, in support of the application:—

It is desired to make the Plaintiff a ward of Court and to remove the present trustee, who has, we say, been guilty of a breach of trust. The circumstances of the case do not bring it within Order XI. rule 1, but it is a case in which under the old practice service would have been permitted out of the jurisdiction: Cons. Ord. X. rule 7; *Drummond* v. *Drummond* (1). The case of a Defendant who has committed a breach of trust is not specially provided for by Order XI., rule 1, and therefore the old practice still prevails.

JESSEL, M.R.:—

The new rule is exhaustive: the old practice is no longer applicable. This case is admitted not to be within the rule, therefore we cannot order service. The application must be refused.

COTTON, L.J., concurred.

Solicitors: *Wright & Co.*, agents for *E. T. Ratcliff, Birmingham.*

(1) Law Rep. 2 Ch. 32.

M. W.

C. A.
1882
Nov. 10.

In re J. B. PALMER'S APPLICATION.
In re TRADE-MARKS REGISTRATION ACT, 1875.

Practice—Staying Proceedings—Staying Trial of Issue of Fact pending Appeal on Question of Law—Rules of Court, 1875, *Order* LVIII., *r.* 16.

Where a question of law has been decided on demurrer, or on a preliminary objection, and an appeal has been brought, the Court will not in general stay the trial of the issues of fact pending the appeal.

THIS was an application by Messrs. *Palmer & Son* to stay the proceedings pending an appeal by them to the House of Lords.

The case came before the Court on application by Messrs. *Bryant & May*, match manufacturers, to cancel the registration under the *Trade-marks Registration Act*, 1875, of a mark registered by *Palmer & Son*, on the ground that the mark was not a proper trade-mark.

When the matter came before Mr. Justice *Chitty*, his Lordship dismissed the application on the ground that the period of five years which had elapsed since *Palmer & Co.* had registered the trade-mark was a bar to the application. But the Court of Appeal took a different view, and overruled the objection from lapse of time, and remitted the case to Mr. Justice *Chitty* to hear the evidence and decide the question of fact between the parties (1).

Palmer & Co. appealed to the House of Lords on the question of law decided by the Court of Appeal, and now desired to stay proceedings before Mr. Justice *Chitty* pending the appeal.

Romer, Q.C., and *Northmore Lawrence*, for the application:—

There is no doubt of the Court's jurisdiction to make the order asked for; and the convenience and saving of expense will be great if our application is granted. The whole of the expense of going into evidence as to questions of facts may turn out to be useless.

(1) 21 Ch. D. 47.

Aston, Q.C., and *Carpmael*, for Messrs. *Bryant & May*, were not called on.

C. A. 1882

In re J. B. Palmer's Application.

In re Trade-marks Registration Act, 1875.

Jessel, M.R.:—

This application is, so far as I know, entirely unprecedented. If there is any precedent, it is the duty of counsel to produce it to the Court; but no authority has been produced. The objection which has been taken in this case is very analogous to a demurrer, and it was always the practice that the trial of the issues of fact should go on pending an appeal on a point of law raised by demurrer. This was an application by summons under the *Trade-marks Registration Act*, but in substance it is an action, and the questions of fact have to be determined on oral evidence; but the Respondents in this case took a preliminary objection on a point of law, which respondents can always do. The Judge allowed the objection, which he was quite justified in doing. He might have directed the evidence to be gone into, and reserved the objection; he did not do so, but decided the point of law. It was no doubt a difficult point of law, and the Appellants, being dissatisfied, appealed against his decision. The Court of Appeal reversed the Judge's decision, and held that he ought to have overruled the legal objection; and they directed the trial of the issues of fact to proceed before him. If the Judge had taken the same view of the law in the first instance as the Court of Appeal afterwards did, he would have heard the matter upon evidence at the time, and the trial would have been over long ago. That being so, the Respondents appeal to the House of Lords, which they have a perfect right to do, and they now desire to stay the trial of the issues which ought to have been over long ago, upon the ground—and that is the only ground that I have heard—that if they succeed in their legal objection the costs of the trial will be thrown away. But the applicants are perfectly solvent, so that if the Respondents succeed they will not lose anything. But what will be the result on the other hand if they fail in their appeal? If the House of Lords affirm the decision of this Court the trial will be delayed perhaps two years, and perhaps the applicants will lose

C. A. 1882

In re J. B. Palmer's Application.

In re Trade-marks Registration Act, 1875.

oral evidence, which is of importance to them. It appears to me that this would be a serious injustice to them; and no real hardship will be done to the Respondents in allowing the trial to proceed in a case where they have solvent people to deal with. The application must be dismissed with costs.

Cotton, L.J.:—

I am of the same opinion. No doubt the Court has jurisdiction to make the order, and would exercise it in a proper case. But I agree with the Master of the Rolls that there is no sufficient ground shewn for the application in this case. It is simply this: the Judge in the Court below held that the applicants were precluded from proceeding by a legal objection; this Court held that he was wrong, and the Respondents have appealed to the House of Lords. No doubt the House of Lords may take a different view, but that is no reason for depriving the applicants of what is their right. They wish to go on with the proceedings, and this Court has decided that they have a right to do so; and the mere fact of extra costs being incurred, which may be useless if the House of Lords decide in favour of the appeal, is no sufficient reason for restraining them.

Solicitors: *Wilson, Bristows, & Carpmael; Hollams, Son, & Coward.*

M. W.

EATON *v.* STORER.

C. A.
1882
Nov. 15.

[1882 E. 3456]

Practice—Leave to deliver Reply after Time—Rules of Court, 1875, *Order* XXIV. *r.* 1; *Order* LVII., *r.* 6.

The time for delivering a reply which would have expired on the 25th of July was extended to the 22nd of August, and then to the 19th of September. On the 26th of September no reply having been delivered the Defendant served notice of motion for judgment. On the same day the Plaintiff, by leave of the Judge, served notice of motion for the following day for leave to deliver a reply, and on the 27th the Judge refused the Plaintiff's motion on the ground of unexplained delay:—

Held, on appeal, that the application ought to have been granted on the terms of the Plaintiff's paying the costs of it.

THE statement of claim in this action in the Court of the County Palatine of *Lancaster* was delivered on the 3rd of May, 1882. The time for putting in a defence was three times extended, and the enlarged time expired on the 4th of July, 1882, on which day the Defendant delivered statement of defence.

On the 25th of July the time for delivering reply was extended till the 22nd of August. On that day the Plaintiff applied for further time, and the time was extended till the 19th of September. On the 26th of September, no reply having been delivered, the Defendant served notice of motion for judgment. On the same day the Vice-Chancellor gave the Plaintiff leave to serve notice of motion for the following day to have a summons for leave to deliver a reply heard by him. On the 27th the Vice-Chancellor dismissed the summons with costs, being of opinion that there had been gross delay in putting in so simple a pleading as a reply, and that the Plaintiff was not entitled to any further indulgence. On the same day the Defendant's motion for judgment was heard, and dismissed with costs. On the 28th of October the Plaintiff delivered a reply, being a simple joinder of issue. The Defendant returned it as irregular. The Plaintiff on the 10th of November served notice of appeal from the order refusing him further time. No explanation of the delay was given.

C. A.
1882
EATON
v.
STORER.

Rigby, Q.C., and *E. S. Ford*, for the appeal.

Robinson, Q.C., and *Hamilton Humphreys*, for the Defendant:—

The delay in filing so simple a pleading as a mere joinder of issue after the time had been twice enlarged is inexcusable, and no explanation of the delay being given, the appeal ought to be dismissed, especially as the application was not made till after we had given notice of motion for judgment.

JESSEL, M.R.:—

According to the usual practice of the Court the Plaintiff's application ought to have been granted by the Vice-Chancellor. The Plaintiff was out of time, and in that case if a motion is made for judgment on admissions in the pleadings, or if the analogous step is taken of a motion to dismiss for want of prosecution, the usual course is to give the Plaintiff time to take the next step upon his paying costs, which is a sufficient punishment, and will prevent the rules from becoming a dead letter. This course will not be departed from unless there is some special circumstance such as excessive delay. In the present case there was no extraordinary delay, the original time for delivering reply not having expired till the 25th of July. The application ought to have been granted on the terms of the Plaintiff paying the costs of it. Our order now will be that the delivery of reply on the 28th of October shall stand, the Plaintiff paying the costs of the application to the Vice-Chancellor, but having his costs of the appeal.

COTTON, L.J., and SIR JAMES HANNEN concurred.

Solicitors for Plaintiff: *Southam & Harwood, Manchester.*

Solicitors for Defendant: *Johnson & Weatherall*, agents for *G. R. Lloyd, Manchester.*

H. C. J.

Ex parte ST. JOHN BAPTIST COLLEGE, OXFORD.
In re METROPOLITAN AND DISTRICT RAILWAYS ACT.

C. A.
1882
Nov. 16.

Practice—Investment of Money in Court—Cash under Control of the Court—Money paid in under Lands Clauses Act, 1845 (8 *Vict. c.* 18) [*Revised Ed. Statutes, vol. ix., p.* 628]—*Law of Property Act*, 1860 (23 & 24 *Vict. c.* 38), *s.* 10 [*Revised Ed. Statutes, vol. xiii., p.* 607]—*General Order, Feb.* 1, 1861.

Money paid into Court under the *Lands Clauses Act* is "cash under the control of the Court" within the meaning of the Act 23 & 24 Vict. c. 38, s. 10, and the General Order of the 1st of February, 1861, and may be invested in any of the securities sanctioned by the Court.

The expression "cash under the control of the Court" means cash standing in Court in any cause or matter.

In re Boyd's Settled Estates (1) overruled.

Cash under the control of the Court may be invested in *East India* 3½ per cent. Stock created since the date of the General Order.

A PIECE of land in *London* belonging to the President and Scholars of *St. John Baptist College, Oxford*, was taken by the *Metropolitan and District Railway Companies* under the powers of the *Metropolitan and District Railways Act*, 1879 (42 & 43 Vict. c. cci.), which incorporated the *Lands Clauses Act*, 1845, and the purchase-money, amounting to £5544, was paid into Court by the companies.

The college then presented a petition asking that the sum of money in Court might be invested in *India* £3½ per Cent. Stock or in *India* £4 per Cent. Stock, and the dividends paid to the Petitioners till further order. The petition was heard before Vice-Chancellor *Hall* on the 27th of April, 1882, but his Lordship refused to authorize the money to be invested in *India* Stock, and ordered it to be invested in Consols, feeling himself bound by the previous decisions to hold that money paid in under the *Lands Clauses Act* was not cash under the control of the Court within the *Law of Property Act*, 1860 (23 & 24 Vict. c. 38), s. 10. But his Lordship expressed a wish that as there had been contradictory decisions on the question the matter should be brought before the Court of Appeal.

(1) 21 W. R. 667.

C. A. 1882

Ex parte St. John Baptist College, Oxford.

In re Metropolitan and District Railways Act.

The Petitioners appealed from this decision.

Wintle, for the Petitioners:—

There has been considerable difference of opinion among the Judges as to the power of the Court to deal with money paid in under special statutes as money under the control of the Court. The order of the 1st of February, 1861, which was made under the authority of the 23 & 24 Vict. c. 38, provided that cash under the control of the Court might be invested, among other things, in *East India* Stock. In several cases under the *Settled Estates Act* the Court has held that money paid into Court is under the control of the Court and sanctioned investments accordingly: *Wall* v. *Hall* (1); *In re Thorold's Settled Estate* (2); *In re Foy's Trusts* (3); *In re Cook's Settled Estates* (4). The last-mentioned case was before Lord *Romilly*, M.R. However Lord *Romilly* decided the other way in *In re Shaw's Settled Estates* (5), and Lord *Selborne*, L.C., in *In re Boyd's Settled Estates* (6), intending to follow Lord *Romilly's* last decision, held that money paid in under the *Settled Estates Acts* was not within the order. But it appears from the report of *Ex parte Rector of Kirksmeaton* (7) that Lord *Romilly*, since deciding *In re Shaw's Settled Estates*, had reverted to his first opinion, so that Lord *Selborne* was not really following the last opinion of Lord *Romilly*, which throws a doubt on Lord *Selborne's* decision. In *In re Taddy's Settled Estates* (8) Vice-Chancellor *Malins* declined to follow the authority of *In re Boyd's Settled Estates;* but the present Master of the Rolls, in *Langmead* v. *Cockerton* (9) felt himself bound to do so, but expressed a wish that the matter should be brought before the Court of Appeal. Mr. Justice *Fry*, in *Ex parte Vicar of St. Mary, Wigton* (10), and Vice-Chancellor *Hall*, in *Ex parte Rector of Kirksmeaton*, also followed the authority of *In re Boyd's Settled Estates*, though with reluctance. In those cases the money had been paid in under the *Lands Clauses Act* as in the present case. In *In re*

(1) 11 W. R. 298.
(2) Law Rep. 14 Eq. 31.
(3) 23 W. R. 744.
(4) Law Rep. 12 Eq. 12.
(5) Ibid. 14 Eq. 9.
(6) 21 W. R. 667.
(7) 20 Ch. D. 203.
(8) Law Rep. 16 Eq. 532.
(9) 25 W. R. 315.
(10) 18 Ch. D. 646.

Briscoe (1) Lord Justice *Turner* had previously expressed doubts upon the subject. There is, however, a distinction between money paid in under the *Settled Estates Act* and under the *Lands Clauses Act*, inasmuch as by the *Settled Estates Act*, 1856, s. 25, it is enacted that the money paid into Court "shall" be invested in Exchequer bills or Consols; whereas in the *Lands Clauses Act*, 1845, s. 70, the enactment is that the money "may" be invested in £3 per Cent. Annuities or in Government or real securities. But even if the investment in that manner was intended to be compulsory the section is so far repealed by the General Order of the 1st of February, 1861, which has the effect of an Act of Parliament: *Garnett* v. *Bradley* (2).

With respect to the New £3½ per Cent *East India* Stock, it has been created under the powers of 42 & 43 Vict. c. 60, which by the 18th section enacts that any capital stock created under it shall be deemed to be *East India* Stock within *Lord St. Leonards' Act* (22 & 23 Vict. c. 35), s. 32, and therefore it comes within the equity of the Order of the 1st of February, 1861, though not under the express words of it.

Kennedy, for the railway companies, made no objection to the order, but submitted that the companies ought not to pay the costs of the appeal.

Jessel, M.R.:—

I think that this money, which has been paid into Court under the *Lands Clauses Act*, is cash under the control of the Court. When we look at the words of the 10th section of 23 & 24 Vict. c. 38, it appears to me clear that the expression must mean cash in Court and nothing else. That section enables the Lord Chancellor, with the advice of the Judges therein mentioned, to make such General Orders from time to time as to the investment of cash under the control of the Court, either in £3 per Cent. Consols, Reduced, or New Bank Annuities, or in such other stocks, funds, or securities as he, with such advice, may think fit; and then it goes on to say that it shall be lawful for the Lord Chancellor to make such orders as he may deem proper for the conversion of

(1) 4 N. R. 311. (2) 3 App. Cas. 944.

C. A. 1882

Ex parte St. John Baptist College, Oxford. *In re* Metropolitan and District Railways Act.

Jessel, M.R.

any £3 per cent. Bank Annuities then standing, or which might thereafter stand, in the name of the Accountant-General of the Court of Chancery, in trust in any cause or matter, into such other stocks, funds, or securities upon which by any such General Order cash under the control of the Court might be invested. Now if the Court can convert any consols standing in the name of the Accountant-General in trust in any cause or matter, it would be extraordinary if it could not order the investment of cash standing in the name of the Accountant-General in any cause or matter. It is therefore plain that the words must mean cash standing in the name of the Accountant-General in any cause or matter.

As to the other point, it has always been held that New *East India* Stock was within the intention of the General Order. The provisions of the Act have been extended to new stocks, and by analogy the General Order may be extended to them also. Therefore the order ought to be made as prayed in the petition.

With respect to the costs, although it is not usual to make the company pay the costs of an appeal of this nature, yet as this question was so doubtful, and as it had been repeatedly suggested by the Judges that it ought to be submitted to the Court of Appeal, I think the appeal was rightly brought, and that it is a proper case for the costs to be paid by the companies.

Cotton, L.J.:—

I am of the same opinion. The principal question is whether the General Order of February, 1861, applies to money paid in under the *Lands Clauses Act*. When we look at the section of the Act of Parliament under which the General Order was made I think there can be no doubt. The first part of the section empowers the Lord Chancellor to sanction certain investments of cash under the control of the Court, and the second part speaks of conversion of £3 per cent. Annuities standing in the name of the Accountant-General in trust in any cause or matter into the investments sanctioned by the Court. Therefore it is clear that cash under the control of the Court must mean cash standing in the name of the Accountant-General in any cause or

matter. With respect to the decision of Lord *Selborne* in *In re Boyd's Settled Estates* (1) it is plain that he intended to follow the last decision of Lord *Romilly*, in whose Court he was sitting; as to which decision he appears to have been mistaken.

I think, therefore, we are free to decide in this case according to what we think to be the true interpretation of the Act.

Solicitors: *Philpot & Son; Burchells.*

(1) 21 W. R. 667.

M. W.

FRY, J.

1882

Nov. 7.

POPPLE *v.* SYLVESTER.

[1882 P. 1380.]

Judgment—Mortgage—Merger.

By a mortgage deed the mortgagor covenanted to pay the debt on a day named, and (by a separate covenant) to pay interest at £7 per cent., so long as the £3000 or any part thereof should remain due.

The mortgagee obtained a judgment for the principal and interest due at the date of the judgment with interest at £4 per cent. on the sum made up by such principal and interest:—

Held, that the security of the mortgage was not merged in the judgment, but that the mortgagee was entitled to sue for the difference between interest at £7 per cent. on the mortgage debt and the interest at £4 per cent. paid under the judgment.

On the 30th of July, 1864, the Defendant, who was rector of *Castleford*, mortgaged certain policies of assurance to the Plaintiff to secure the repayment of £3000, subject to a proviso for redemption on payment by the Defendant on the 30th of January, 1865, of the £3000 with interest for the same after the rate of £7 per cent. The mortgage deed contained four separate covenants; 1st, that the Defendant should pay the £3000 with interest at £7 per cent. on the day provided for payment. 2nd, that in case the £3000 should not be paid on the day the Defendant would "so long as the sum of £3000 or any part thereof should remain due on the security of the said indenture" pay interest for the £3000, or for so much thereof as should for the time being remain unpaid, after the rate aforesaid. 3rd, that the Defendant would during the continuance of the security pay the premiums on the mortgaged policies. 4th, that if the Defendant should neglect to pay the premiums it should be lawful for the Plaintiff to pay them, and that the Defendant would repay to the Plaintiff the money paid by him for such premiums.

The payments of interest upon the £3000 fell into arrear, and on the 23rd of September, 1869, the Plaintiff obtained judgment against the Defendant for the sum of £3145 10*s.* 7*d.*, being the amount then due to the Plaintiff for principal and interest and for a premium paid by the Plaintiff upon one of the policies of assurance.

In October, 1869, the Plaintiff issued a sequestration under the judgment against the Defendant's benefice of the rectory of *Castleford*, and the tithes and profits thereof.

On the 1st of March, 1882, a payment was made by the sequestrator to the Plaintiff which satisfied the amount then remaining due in respect of the said £3145 10*s.* 7*d.*, with interest at £4 per cent.

The Plaintiff sought to recover the sum of £652 14*s* 4*d.* (being the difference between interest on the £3000 at the rate of £7 per cent., as secured by the mortgage deed and the interest at the rate of £4 per cent. paid to the Plaintiff by the sequestrator) and the sum of £1753 7*s.* 7*d.*, due in respect of premiums paid by the Plaintiff upon the mortgaged policies and of the interest thereon.

The Defendant put in a demurrer to the Plaintiff's claim for £652 14*s.* 4*d.* and £1753 7*s.* 7*d.*, but abandoned the latter part of the demurrer relating to the recovery of the premiums paid by the Plaintiff for the Defendant.

Cookson, Q.C., and *C. Plummer*, for the demurrer:—

This mortgage debt is merged in the judgment: *In re European Central Railway Company* (1).

In that case Baron *Bramwell* says "there cannot be two debts, one leviable by execution the other charging the undertaking."

Glasse, Q.C., and *Nalder*, for the mortgagee:—

The judgment did not prevent the continuance of the security, the mortgagee could still foreclose. He still had a right to keep up the premiums, and to claim interest not included in the judgment: *Cook* v. *Fowler* (2); *In re Agriculturist Cattle Insurance Company* (3); *Goodchap* v. *Roberts* (4).

There is here a distinct covenant to pay interest during the continuance of the security.

FRY, J., after stating the facts, said:—

I am bound to look at the express contract between the parties, and to inquire how far the judgment has put an end to the contract. Part of the contract was that the mortgagor would "so

(1) 4 Ch. D. 33.
(2) Law Rep. 7 H. L. 27.
(3) 4 Ch. D. 34, n.
(4) 14 Ch. D. 49.

FRY, J.
1882
POPPLE
v.
SYLVESTER.

long as the said sum of £3000 or any part thereof should remain due on the security of the indenture" pay interest for the £3000, or for so much as should for the time being remain unpaid, at £7 per cent. Has that been extinguished by the judgment? The effect of the judgment was to extinguish the personal covenant to pay the £3000—that has become a *res judicata*—but the judgment has not determined the security, or put an end to the charge.

The Plaintiff himself has indeed taken the same view, for by not arguing the part of the demurrer which relates to the premiums on the policies he has admitted that the premiums which were paid after the date of the judgment were paid during the continuance of the security; for by the mortgage deed the Plaintiff was entitled to recover premiums paid "during the continuance of the security." So that in his view the judgment cannot have put an end to the security.

But I do not proceed on any admission by the Defendant, but on my own view of the law, which is that although a personal covenant is extinguished by a judgment upon it, the charge remained notwithstanding the judgment, and therefore the express covenant "so long as the principal sum should remain due on the security of the indenture," continues in force. The only ambiguity in the case arises from the fact that part of the security is extinguished by the judgment and part remains.

I ought, perhaps, to make a remark upon the case of the *European Central Railway Company* (1). There the covenant being to pay the principal sum, with interest "until repayment thereof," the Court held that these words meant "until the day fixed for payment." And therefore they held that there was no covenant to pay beyond the day fixed for repayment of the principal. Here I have held that there is an express covenant to continue the payment of interest so long as the security should continue. That case, therefore, has no application, and I overrule the demurrer with costs.

Solicitors for Plaintiff: *Collyer-Bristow, & Co.*
Solicitors for Defendant: *Speechly, Mumford, & Landon.*

(1) 4 Ch. D. 33.

C. W. C.

CROGGAN *v.* ALLEN.

FRY, J.

1882

May 12.

[1880 C. 0749.]

Costs—Administration.

In an administration action no costs ought to be given out of the estate, except for those proceedings that are in their origin directed with some shew of reason and a proper foundation for the benefit of the estate, or which have in their result conduced to the benefit thereof.

A tenant for life under a will who had duly received the income of the estate, and whose solicitors had expressed themselves satisfied with the accounts rendered by the executors, instituted an action for the administration of the estate. The accounts taken shewed that the Plaintiff had been slightly overpaid:—

Held, that the Plaintiff must have no costs of the action, and must pay the costs of the rendering of the income account.

THE testator, General *Croggan*, devised and bequeathed the residue of his property to trustees, who were to pay the income thereof to his widow (the Plaintiff), for her life, or during widowhood, with remainder to two persons. The testator died in 1877, and the trustees in due course furnished the Plaintiff with accounts down to October, 1878, which dealt with capital and income.

This administration action was commenced by summons in Chambers early in 1880 against the Defendants, the executors and trustees, for the usual accounts and inquiries.

Since the month of June, 1878, no dividends received in respect of the testator's estate had been paid to the executors, but the whole amount had been paid to the Plaintiff's account at Messrs. *Barings*, less a sum of £40 a year, which was applied in payment of annuities bequeathed by the will. This arrangement was made with the approval of the Plaintiff. Messrs. *Barings* had acted as the bankers of the testator, and continued the account with the executors, and the Plaintiff had also opened an account with them.

The Plaintiff had frequently before the commencement of the action applied by herself and by her solicitors for accounts and information relating to the testator's estate, and such accounts

FRY, J.
1882
CROGGAN
v.
ALLEN.

and information had always been rendered without delay, and her former solicitors had also before the commencement of the action expressed themselves satisfied with the accounts rendered by the Defendants.

In May, 1878, the Plaintiff expressed a desire to receive the income of her husband's estate without the intervention of the executors, and to pay the £40 annuities herself as it became due.

The Defendants contended that under these circumstances it was unreasonable that they should be called on to render accounts to the Plaintiff.

The Plaintiff, however, insisting on her right to an account of the income, the Chief Clerk directed that the Plaintiff's solicitors should supply to the Defendants' solicitors a copy of the Plaintiff's bankers accounts with her, and the Defendants prepared from such copy and verified an account of the Plaintiff's life income, of which however they contended that the Plaintiff ought to bear the costs.

The result of taking the accounts was to shew that the Plaintiff had been overpaid the sum of £5 1*s.* 9*d.*

The residuary legatees obtained an order to attend the proceedings.

Cookson, Q.C., and *Herbert Smith*, for the Plaintiff:—

The costs of the action must be paid out of the estate: *In re Tann* (1).

Fischer, Q.C., and *W. Baker*, for the executors and residuary legatees:—

The Plaintiff ought to pay the costs of these unnecessary proceedings: *Fane* v. *Fane* (2); *Hilliard* v. *Fulford* (3); *In re Chennell* (4); *Bartlett* v. *Wood* (5).

FRY, J.:—

In this action the only question remaining for decision is the question of costs. Another question was raised, which was this,

(1) Law Rep. 7 Eq. 436.
(2) 13 Ch. D. 228.
(3) 4 Ch. D. 389.
(4) 8 Ch. D. 492.
(5) 9 W. R. 817.

whether the Defendants who had paid into the account of the Plaintiff the income from about a year after the death of her husband were bound to obtain from her a copy of her account and to verify that for her information. That question is I believe the only other question which has arisen in the action. That came before the Chief Clerk, and he determined that such an account must be obtained by the Defendants from the Plaintiff and verified as such, and that was done accordingly.

Now the testator left his property in a very simple way. [His Lordship read the effect of the will, and continued:—] After the death of the testator in 1877, the trustees, through their solicitors, furnished accounts down to October, 1878, and these accounts dealt with capital and income. I have asked the Plaintiff's counsel to point out to me a single defect in those accounts, and not a single item has been challenged. [His Lordship then stated the arrangement under which the Plaintiff received her income by payment thereof to her account with Messrs. *Barings*, and continued:—] Notwithstanding this arrangement, the Plaintiff insisted on an account of income, which was rendered in the way I have mentioned, though her former solicitors had been fully satisfied with the accounts and explanations previously given, and had intimated their intention to require no further information from the executors.

Now I ask myself whether there was any good reason for instituting this action at all, the only result of which is that the Plaintiff is found to have been overpaid some £5 or £6. No good having been gained by it, the question arises, what ought I to do with the costs under these circumstances? I am very glad to have had my attention called to the language of Lord *Westbury* used in a case of *Bartlett* v. *Wood* (1), because no person can sit in this Court and not be aware of the enormous amount of costs which are incurred in administration actions which confer no real benefit upon any human being except the solicitors concerned. Oftentimes when there is nothing but one simple question to be determined the whole accounts of the estate are taken from the very moment when the testator died. Often when there is no question at all the accounts are taken, and the

(1) 9 W. R. 817, 818.

FRY, J.
1882
CROGGAN
v.
ALLEN.

only thing that makes such a course of practice bearable is this, that the Court visits with such extreme rigour any breach of trust in a trustee or executor, that it is bound to keep its doors open to executors and trustees for their protection. Did the trustees in this case desire any protection and desire that the account should be taken? I find they had no such wish: they were content with the accounts which they rendered, and they were very reasonably content with them because those accounts were truthful accounts. Now what did Lord *Westbury* say in the case which I have referred to? "There can be no doubt that, as a general rule, in cases of administration it is, above all things, the bounden duty of the Court to attend to the subject of the payment of costs, and that no costs ought to be given out of an estate, except for those proceedings only that are in their origin directed, with some shew of reason and a proper foundation, for the benefit of the estate, or which have in their result conduced to that benefit." That principle I apply to the present case, and I disallow the Plaintiff's costs of the action. I have felt strongly inclined to go further, and to require the Plaintiff to pay the whole costs of the action, but I think, if I were to do so, I should be going beyond what is the ordinary practice of the Court; but with regard to the costs occasioned by the most idle proceeding insisted upon by the Plaintiff, viz., the rendering the income account, I direct that all costs with respect to the income account be paid by the Plaintiff.

Solicitor for Plaintiff: *W. Compton Smith.*
Solicitors for Defendants: *Tippetts & Son.*

C. W. C.

BREWER *v.* BROADWOOD.

FRY, J.
1882
Nov. 15.

[1881 B. 2686.]

Vendor and Purchaser—Title—Defect—Repudiation.

A vendor contracted to sell and a purchaser to purchase an agreement for a lease. The purchaser afterwards repudiated the contract.

At the date of the agreement, and of the repudiation, the agreement to lease was voidable at the will of a third party, but the third party took no steps to avoid the agreement, but was willing to confirm it on certain conditions:—

Held, that the purchaser was entitled to repudiate the contract.

ON the 1st of April, 1881, the Plaintiff, as purchaser from the trustee in bankruptcy of *George Stephenson*, a builder, was entitled to the benefit of an agreement dated the 17th of August, 1878, whereby the Earl of *Ilchester* granted certain land at *Kensington* to *Stephenson* for a term of ninety years, and *Stephenson* agreed to erect two houses thereon and to pay rent. One of the houses had been completed and demised to *Stephenson*, and was called No. 1, *Melbury Road*, but the second house had not been begun. *Stephenson's* petition in bankruptcy was presented on the 17th of November, 1880, and in January, 1881, his trustee sold to the Plaintiff all the property of *Stephenson* then vested in the trustee in the said building agreement. On the 1st of April, 1881, the agent of the Defendant wrote to the agent of the Plaintiff as follows:—

"Plot of land next to No. 1, *Melbury Road*." "I hereby agree to purchase the agreement to lease the above land from Lord *Ilchester* for the sum of £800."

The offer to purchase was shortly afterwards accepted on behalf of the Plaintiff, and a deposit of £80 was paid on account of the purchase-money of £800.

On the 6th of April, 1881, the Defendant repudiated the contract entered into by his agent, and this action was brought to recover damages for the breach of the contract.

The principal contention on the part of the Defendant was

FRY, J.
1882
BREWER
v.
BROADWOOD.

that the building agreement was on the 1st of April and the 6th of April, 1881, voidable at the will of the Earl of *Ilchester* under the following circumstances:

The agents of the Earl of *Ilchester* had written to *Stephenson* a letter dated the 29th of July, 1880, extending the time for finishing the second house from the period named in the first instance for completion thereof on condition that the excavations should be at once commenced, and that reasonable progress should be made with the building of the house within the next three months, and that the house should be covered in by the 17th of May, 1881, and finished in due course.

It was admitted that on the 1st and 6th of April, 1881, no progress had been made with the building of the house, and that the agreement to lease had thereby become voidable at the option of the Earl of *Ilchester;* but on the 6th of April, 1881, the same day that the Defendant repudiated his contract, the Earl of *Ilchester's* solicitors wrote to the Plaintiff's solicitors a letter by which it was agreed that, provided the ground rent up to the 25th of March, 1881, were paid within a week, the Earl of *Ilchester* would be ready to extend the time within which the house was to be covered in until the 30th of October.

Cozens-Hardy, Q.C., and *Seward Brice*, for the Plaintiff:—

We are entitled to damages for the Defendant's breach of contract: *Noble* v. *Edwardes* (1).

Davey, Q.C., and H. A. *Giffard*, Q.C., for the Defendant:—

The Defendant was entitled to repudiate, because the Plaintiff never had what he contracted to convey: *Forrer* v. *Nash* (2).

[FRY, J.:—The thing sold in this case was not "land" but "an agreement." Is not a contract to sell an agreement satisfied by the selling of a voidable agreement, if it is not actually avoided?]

An agreement to sell a lease cannot be satisfied by selling a voidable lease: *Penniall* v. *Harborne* (3). The Plaintiff could

(1) 5 Ch. D. 378.
(2) 35 Beav. 167.
(3) 11 Q. B. 368.

never aver that he was "ready (in the sense of able) and willing to convey": *Weston* v. *Savage* (1); *Wilson* v. *Wilson* (2).

Cozens-Hardy, in reply:—

The expressions in *Forrer* v. *Nash* (3) are too wide. For example, it was never held a reason for repudiating a contract that a wife turned out to be entitled to dower out of the land sold.

[FRY, J.:—That was always considered a subject for compensation.]

A vendor has been allowed even to get in a fee after contract: *Sidebotham* v. *Barrington* (4); here the Earl of *Ilchester* extended the time for completion, and did not avoid the building agreement.

FRY, J., stated the agreement of the 1st of April, 1881, and said:—

The first inquiry is, what is the obligation of a person who agrees to sell an agreement to lease? It may be shewn either from the surrounding circumstances or by direct evidence, that the intention of the agreement is to sell only such interest, if any, as the vendor may have: and in such a case as that the purchaser has no right to require a title to be shewn by the vendor; but in the absence of such evidence the view which I take of such an agreement is that it requires the vendor to shew that he has a title to a valid agreement. The law of *England* in the case of a sale of land in fee simple requires the vendor to shew that he has the fee simple of the land. In the case of a sale of a lease, it requires the vendor to shew that he has a valid title to the lease or to the term granted by the lease, Likewise, in the case of an agreement to lease, I hold that the vendor is bound to shew that there is a subsisting valid agreement to lease. How do the facts stand in the present case? On the 17th of August, 1878, Lord *Ilchester* had entered into a building agreement with Mr. *Stephenson*, under whom the Plaintiff claims, and by that he agreed to

(1) 10 Ch. D. 736.
(2) 14 C. B. 616.
(3) 35 Beav. 167.
(4) 4 Beav. 110.

FRY, J.
1882
BREWER
v.
BROADWOOD.

lease a certain plot of land for a term of ninety years from the 24th of June, 1878. It was agreed that on that plot two houses should be built, and it was further agreed that both houses should be completed by the 17th of August, 1880, two years from the date of the building agreement. On the 31st of January, 1880, Lord *Ilchester* had granted a lease of one of the houses, and the agreement only remained operative with regard to the remaining house on which £100 rental was to be secured; and on the 29th of July, his agents had written a letter by which the time for the completion of the houses was extended to the 17th of May, 1881, subject to the four conditions which are mentioned in that letter. The first was that the excavations should be at once commenced; the second was, that reasonable progress should be made with the building of the houses within the next three months; the third was, that the houses should be covered in by the 17th of May, 1881, and the fourth was, that the houses should be finished in due course. Now, it is conceded that at any rate the second condition had not been performed, and that no progress had been made with the building of the houses within the three months next after the 29th of June, 1880. On the 1st of April, 1881, there was therefore a subsisting agreement to lease, but not a valid agreement, in the sense that it was not voidable; it was subsisting but voidable, because the conditions of the original agreement and the conditions of the extended agreement were both of them in default. Therefore, it appears to me that, according to the true construction of the agreement on the 1st of April, the Plaintiff was not then in a position to make out a valid title to the agreement.

But the inquiry then arises, was he before the 6th of April in a position to make out a title, because that is the date at which the Defendants wrote a letter repudiating the agreement. That turns upon the inquiry of what happened on the 6th of April, between Messrs. *Fladgate*, who were the agents for the Earl, and the agents for the Plaintiff. On that day, Messrs. *Fladgate* wrote a letter, in which they proposed an extension of term to the 31st of October, subject to certain conditions. One of those conditions was, that the three-quarters of a year's ground rent payable on

the 25th of March then last, should be paid on the 12th of April. It was not therefore an unconditional or unqualified enlargement of the term. The agreement for the lease therefore, was only rendered valid upon the performance of the condition which was not then performed and which it was of course doubtful whether it ever would be performed. In point of fact it never was performed, but that appears to me immaterial. The material fact seems to me to be this, that on the 6th of April there was only a conditional and contingent waiver of the right to avoid the term. Now I ask myself whether the Plaintiff under that state of circumstances was in a position to shew that he had a valid agreement to lease, and the answer appears to me to be that he had not. He had nothing but this conditional and voidable agreement. Was the Plaintiff then at liberty to repudiate the contract? In my judgment he was. In the first place, I think that this was a contract in which time was of the essence, because in any event the property to be acquired by Mr. *Broadwood* was only for a term of years, and in any event he was only to have a limited period within which to complete his building. Every day, therefore, was of great importance to Mr. *Broadwood*, and it was a great hardship that he should be postponed even till the 12th of April to know whether there was a valid or not a valid agreement. But in the next place, I think there is great good sense in the view which the Master of the Rolls expressed in the case of *Forrer* v. *Nash* (1), that "where a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.'" That was the case here, and on that principle the Defendant was justified in repudiating the contract. That principle has of course, nothing whatever to do with cases in which there are outstanding interests which the vendor has the power of getting in, because in those cases he is able and he is under an obligation to get them in; but it has a great deal to do with a case in which the only title of the vendor is contingent upon the will and volition of a third person. That was the case in the

(1) 35 Beav. 171.

FRY, J.
1882
BREWER
v.
BROADWOOD.

present instance. Therefore I hold that the Defendant was justified in repudiating, and I dismiss this action with costs, and I direct the repayment of the deposit with interest at £4 per cent. from the 6th of April.

Solicitors for Plaintiff: *Boxall & Boxall.*
Solicitors for Defendant: *Wade & Lyall.*

C. W. C.

In re FEATHERSTONE'S TRUSTS.

KAY, J.

1882

Nov. 3, 6.

Will—Gift of Residue unto and equally amongst all the Children of J. D. *and* R. A. *to be vested Legacies at Testator's Death—Death of* R. A. *before Testator—Children of* R. A. *not entitled—Residuary Legatees living at Death entitled.*

Testator gave to trustees all his estates upon trust to sell, and directed that the proceeds of sale should be part of his personal estate and be subject to the dispositions concerning his residuary estate, and after giving legacies—one to *R. A.*, and another to the children of *J. D.*—he gave the residue unto and equally amongst all the children of his brother-in-law, *J. D.*, and the said *R.A.*, and directed that the same should be vested legacies at the time of his decease. *R. A.* died before the testator, leaving children living at the testator's death. Three children of *J. D.* were living at the testator's death:—

Held, that *R. A.* would, if living, have taken a share of the residue and not his children, and that, as he died before the testator, the share which he would have taken belonged to the three surviving residuary legatees, not as a class with *R. A.*, but under the special terms of this will.

PETITION.

William Featherstone, who died in May, 1880, by his will made in March, 1869, gave to two trustees all his real and leasehold estates in *Yorkshire* upon trust to sell; and directed that the proceeds of sale and the rents and profits accruing should be deemed to be part of his personal estate, and should be subject to the disposition concerning his residuary estate. As to the residue, after payment thereout of his debts, funeral and testamentary expenses and legacies, the testator gave the same to the trustees upon trust to pay £10,000 unto and equally between his nephew and nieces, the four children, *nominatim*, of Dr. *John Dowson*, and in case any one or more of them should die in his lifetime leaving issue, then he gave his or her share to such issue as tenants in common; and in case of the death of any one or more in his lifetime without leaving issue at his or her death, then in trust as to as well the share or shares originally limited as the shares or share eventually limited under the trusts to any and every child so dying for the other and others of them, and if more than one,

KAY, J.
1882
In re FEATHERSTONE'S TRUSTS.

in equal shares, and if only one to such one his or her executors, administrators, and assigns. The testator directed the trustees to pay a further sum of £900 to *J. F. Abbey*, the further sum of £900 to *Robert Abbey*, the further sum of £700 to *Thomas Abbey*, and the further sum of £700 to *William Abbey*, the four children of his late relative *Thomas Abbey*, and in case any one or more of them should die in his lifetime leaving issue he gave the legacy of him so dying to such issue as tenants in common; and in case of the death of any one or more of them (the four above named) in his lifetime without leaving issue he gave the legacy of him or them so dying unto the others or other of them; if more than one, in equal shares, and if only one, then to such one his executors, administrators, and assigns.

The testator, after bequeathing to numerous relatives and friends legacies amounting to a considerable sum, said, "And if there shall be any residue of my estates and property remaining after payment of the foregoing legacies and the costs, charges, disbursements, and expenses attending the above trusts, then I give the same residue unto and equally amongst all the children of my said brother-in-law Dr. *John Dowson*, and the said *Robert Abbey*, of *Coatham*, and I direct that the same shall be vested legacies at the time of my decease."

Robert Abbey died in the testator's lifetime leaving eleven children, who were living at the testator's death, and some of them were infants.

Of Dr. *John Dowson's* four children one died in the testator's lifetime. The residuary estate had been paid into Court, questions having arisen as to whether *Robert Abbey* or his children took an interest under the will, and in case he did, who were entitled to his share in consequence of his death as above-mentioned.

Hastings, Q.C., and *Reginald Hughes*, for the Petitioners, the three surviving children of Dr. *Dowson*:—

One question is, whether upon the construction of the will, *Robert Abbey* took a share as one of a class, or whether his children take shares. To entitle his children to take, the word "of" should have been used, or it must be understood; but in *Lugar* v.

Harman (1) a gift of residue to be divided equally "amongst all the children of my late cousin *E. L.*, and my cousin *P. F.*, and their lawful representatives," was held to be a bequest to the children of *E. L.* and *P. F.* himself, and not to his children, as the word "of" would have to be understood; but as the words stood they had a plain grammatical sense. In *Peacock* v. *Stockford* (2), there was a bequest of life-interests in four distinct funds to four nieces, and the testator directed that upon the death of either of them the principal fund, the interest of which was to be received by her or them, should be held in trust for "the benefit of all and every the lawful children of her or them so dying and of the survivors or survivor of my other nieces hereinbefore named in equal shares." One of the nieces having died leaving two children, it was held that her fund was divisible amongst those children and the children of the three other nieces, it being proper to give some force to the word "of," that word being referrable to the word children in the last antecedent. Lord Justice *Turner* said, "Had the disposition been in the latter form," *i.e.*, in trust for the benefit of the children of her or them so dying and the survivors or survivor of my other nieces—"the surviving nieces must, we think, have been held entitled, according to the decision in *Lugar* v. *Harman* and what is said in *Doe* v. *Joinville* (3)." In *Hawes* v. *Hawes* (4), where the cases are all collected, there was a voluntary settlement of gavelkind lands by *A.* and his cousin to *C.* for life, with remainder to her issue, and in default of any "to the use of the right heirs of *E.* deceased and *J.*" who was living, "the two sisters of *G. A.*, their heirs and assigns as tenants in common," and the Master of the Rolls held that *J.* herself took a vested interest in a moiety of the property, and he referred to *Lugar* v. *Harman* and said, "the case . . . . is very precise," and he also referred to *Peacock* v. *Stockford*, which is the leading case on the subject, and the converse of this. It is submitted that this case is precisely the same as *Lugar* v. *Harman*, and that the Court will declare that the children of *R. Abbey* had no interest in the residue.

(1) 1 Cox, 250.
(2) 3 D. M. & G. 73.
(3) 3 East, 172.
(4) 14 Ch. D. 614.

KAY, J.

1882

In re FEATHERSTONE'S TRUSTS.

Davenport, for the children of *Robert Abbey*:—

It is submitted that this case is distinguishable from those which have been referred to, as the testator directed that the interests should "be vested legacies at the time of my decease," and he could not mean *Robert Abbey*, who was born in 1814, alone; if he did, the words were unnecessary. Such words take this case out of the authorities which have been decided upon a grammatical construction. It is always a question whether it is absolutely necessary to have the word "of" inserted. The cases on the point are commented upon by Mr. *Vaughan Hawkins* on Wills, and in addition to the cases which have been cited, he refers to *Mason* v. *Baker* (1) and *In re Davies' Will* (2), and I ask the Court to say that the word "of," is not necessary here. *Hawes* v. *Hawes* (3) was a case of real estate, and does not govern the present.

[KAY, J.:—The ordinary rule is, that words like these mean the same whether the property given be real or personal.]

It is submitted, that the testator intended his words to apply to all—the many and not a few—of these children, and it should be noticed that the testator gave *Robert Abbey* a legacy of £900, and that therefore he did not intend to give him a share of the residue.

KAY, J.:—

I will at once give my decision upon the question whether *Robert Abbey* takes an interest as one of the residuary legatees, or his children take interests equally with the children of Dr. *Dowson*. On the proper grammatical construction of the words used it would be necessary in order to enable the children of *Robert Abbey* to take, to insert the word "of" so that it should read the children of Dr. *Dowson*, and "of the said *Robert Abbey*."

In *Lugar* v. *Harman* (4) where the gift was to the children of *E. L.*, and "my cousin *P. F.* and their lawful representatives," it was held that the gift was not to the children of *P. F.*, but to *P. F.* himself, and the children of *E. L.*, all taking equal shares.

(1) 2 K. & J. 567.
(2) 29 Beav. 93.
(3) 14 Ch. D. 614.
(4) 1 Cox, 250.

There have been various subsequent cases, particularly that of *Peacock* v. *Stockford* (1), where Lord Justice *Turner* said, "Now, in this case, the terms of the disposition are 'in trust for the benefit of all and every the lawful children of her or them so dying, and of the survivors or survivor of my other nieces,' not 'in trust for the benefit of the children of her or them so dying and the survivors or survivor of my other nieces,'" and, he added, that if the disposition had been "in the latter form the surviving nieces must, we think, have been held entitled according to the decision in *Lugar* v. *Harman* (2), and what is said in *Doe* v. *Joinville* (3)." In *Hawes* v. *Hawes* (4) the present Master of the Rolls referred to *Lugar* v. *Harman*, and said, "There it was held that you could not put in the word 'of,' and that you must understand the words as they stand in their plain grammatical sense," and after referring to various other cases, he decided that the words "to the use of the right heirs of *E.* deceased, and *J.*," were to be read as not entitling the heirs of *J.*, but that *J.* herself took a vested remainder. Therefore I consider that on the grammatical construction this question has been settled by authority, and that *Robert Abbey* would have been entitled to take with the children of Dr. *Dowson*.

Then is there anything in the will which overrules this construction? It was submitted that the testator's direction that the legacies should be vested at the time of his decease, must receive consideration, because as *Robert Abbey* was living, and of age, at the date of the will, the words were unmeaning and unnecessary as regards him. But according to my construction of the will, *Robert Abbey* would have taken together with a class, and therefore these words are quite proper and have a meaning, for though he was not an infant at the time of the death of the testator, some of the children of Dr. *Dowson* might be, and therefore this is no indication that the words are to be read not in their grammatical sense. It was also contended that as *Robert Abbey* had a legacy of £900 given to him in a previous part of the will, the testator did not intend that he should have a beneficial interest in the residue; but it should be remembered that the testator

(1) 3 D. M. & G. 73, 78.
(2) 1 Cox, 250.
(3) 3 East, 172.
(4) 14 Ch. D. 614.

KAY, J. 1882 *In re* FEATHERSTONE'S TRUSTS.

gave the sum of £10,000 to the children of Dr. *Dowson*, as well as shares in the residue, and accordingly there is no indication from that circumstance, that he did not mean *Robert Abbey*, but his children, to be benefited; besides, it is a common thing enough for a testator to give to legatees bequests of pecuniary legacies in one part of the will, and afterwards to increase them by giving to the same legatees shares of the residue. As I see no reason to induce me to depart from the grammatical construction of the will, I shall hold that the residue would have been divisible between the children of Dr. *Dowson* and *Robert Abbey*.

Hastings, Q.C., and *Reginald Hughes*:—

The other question is, *Robert Abbey* having died before the testator, what became of the share which he would have taken in case he had survived the testator. Upon the authorities of *Porter* v. *Fox* (1); *Shaw* v. *M'Mahon* (2); *Clark* v. *Phillips* (3); *In re Stanhope's Trusts* (4), and *Aspinall* v. *Duckworth* (5), it is submitted that the question whether there was a lapse has been settled. There would be no doubt on the point but for the cases of *Re Chaplin's Trust* (6) and *Wilson* v. *Atter* (7). But in this case, the testator said they were to be vested interests at the time of his death, and the testator intended that the whole residue should be divided amongst the residuary legatees who survived him. These are the only two cases which are in conflict with the long line of decisions beginning with *Porter* v. *Fox*. *Re Chaplin's Trust* is commented upon in *Jarman* on Wills (8), as being inconsistent with the previous cases. In popular language, the legatees were not a class, but in legal they were. A class is not the less a class because some of them have been named. The words of survivorship were put in, but they are tautologous, because if a testator gives to the children of *A.*, he must mean the children living at his death. This case is distinguishable from *Re Chaplin's Trust*, as *Robert Abbey* predeceased the testator and the persons to take have been reduced to the three petitioners.

(1) 6 Sim. 485.
(2) 4 D. & War. 431.
(3) 17 Jur. 886.
(4) 27 Beav. 201.
(5) 35 Beav. 307.
(6) 12 W. R. 147.
(7) 44 L. T. (N.S.) 240.
(8) 4th Ed. vol. i. p 269.

If *Robert* had survived, he would have taken one-fourth, and if he had been the only survivor at the testator's death, he would have taken the whole fund; but in the events which have happened, the Petitioners are, it is submitted, entitled to it in equal shares.

Loughborough, for the testator's heir-at-law and next of kin:—

Notwithstanding what is stated in *Jarman* on Wills (1) as to the distinction between the "popular" meaning and the "legal" meaning of the word "class," there is the primary and fundamental idea underlying the word in all the reported cases. A class is *prima facie* a set of persons filling some common capacity, or answering some common condition or description, whether of relationship or otherwise. There are several cases where testators having referred to a "class" have added the name of some person or persons as a member or members of that class, *e.g.*, a gift to all my nephews, including *John Williams*. The rule in such cases is that it is not the less a class because one or more members of the class are referred to by name: *Shaw* v. *M'Mahon* (2), *In re Stanhope's Trusts* (3), and there are other cases. But the rule is not applicable to a case where the named person is a stranger to the class, and cannot by any possibility be included in the common description of the class. That is the *ratio decidendi* of *Re Chaplin's Trust* (4); *Wilson* v. *Atter* (5). Of course a testator can give his residue to *A.* and the children of *B.* so as to make an aggregate class, but that is a question of intention to be looked for in the will. The only words which can be relied on here as shewing such intention are those which direct that all the legacies shall vest at testator's death, but that was only a superfluous expansion of what the law would otherwise have implied: *Wilson* v. *Atter* and it would be giving a very unnatural construction to the words to hold that they by themselves afford sufficient evidence of intention to create an aggregate class, therefore it is submitted that there is a lapse.

Brodrick, for the trustees.

(1) 4th Ed. vol. i. p. 269.
(2) 4 D. & War. 431.
(3) 27 Beav. 201.
(4) 12 W. R. 147.
(5) 44 L. T. (N.S.) 240.

KAY, J.

1882

In re FEATHERSTONE'S TRUSTS.

Reginald Hughes, in reply.

Nov. 6. KAY, J.:—

William Featherstone, by his will in 1869, gave all his real estate in the county of *York* to trustees upon trust to sell, the proceeds to be subject to the disposition of his residuary personal estate, and he gave the residue of his personal estate to the same trustees upon trust to pay certain legacies, and subject thereto "unto and equally amongst all the children of my said brother-in-law Dr. *John Dowson* and the said *Robert Abbey* of *Coatham*, and I direct that the same shall be vested legacies at the time of my decease."

I have already decided that under this bequest *Robert Abbey*, and not his children, would take an equal share of the residue with the children of Dr. *Dowson*. But *Robert Abbey* died in the testator's lifetime, and the question is who is entitled to the share intended for him. I reserved my judgment to consider the authorities, as it seemed to me that upon this point they were somewhat in conflict. In *Porter* v. *Fox* (1), a bequest for the benefit of the testator's grandchildren and his nephew *Thomas Owen*, and to be distributed as they should become of the age of twenty-five years respectively, was held to be void for remoteness as to *Thomas Owen* as well as to the grandchildren, although he was nineteen years of age at the death of the testator. The Vice-Chancellor said the testator meant each person's share to be determined by the number of the class consisting of his grandchildren and *Thomas Owen* who should be living when the first attained twenty-five.

In *Shaw* v. *M'Mahon* (2), the gift was "amongst all my children living at my death, including my sons *Beresford* and *William*,' and by a codicil the gift to *William* was revoked. Lord *St. Leonards* held that the gift was to a class, and that the other residuary legatees took the whole. This was followed by Vice-Chancellor *Stuart* in *Clark* v. *Phillips* (3), where the gift was to the children of *A.*, the children of *B.*, to *C.*, to the children of her brother *D.*, and to *E.*, in equal shares. In *In re Stanhope's Trusts* (4),

(1) 6 Sim. 485.
(2) 4 D. & War. 431.
(3) 17 Jur. 886.
(4) 27 Beav. 201.

the gift was of residue to the testator's daughters *A.*, *B.*, *C.*, and *D.*, and their issue, and if he should have any other daughters they should be equally entitled with them to such residue as though named in his will share and share alike. One of the daughters named died in his lifetime, and Lord *Romilly* held that it was a gift to a class, and therefore there was no lapse.

In *In re Ann Wood's Will* (1) a gift to the testator's nephew *A.* and to the testator's brothers and sisters or their children, and to his relation *B.*, was held to lapse as to the share of *B.*, he having died in the testator's lifetime. In *Drakeford* v. *Drakeford* (2) the same learned Judge held that a gift to *A.* for life, and at his death to be equally divided between his surviving children and his niece *Rosamond Willows*, was not a gift to a class, because a class must be ascertained at one and the same time. His Lordship said: "I have no doubt that if there be a gift to the children of *A.*, and to my niece *Rosamond*, and to my niece *Mary*, and so on, that may be a class. But to make this one class it must be to this effect:—'I leave the whole of my funded property to my brother for his life, and at his death the property to be equally divided amongst his children and my niece *Rosamond Willows*, or such of them as shall survive the tenant for life.' In all these cases the class would be ascertained at a particular period, and if one died there would be no lapse. But here *Rosamond Willows* is to take her share at all events; it is given absolutely to her, and the only persons to be ascertained are the children of the brother, and they are to be ascertained at his death . . . . There is in this sense a class, viz., certain surviving children, but they do not form the whole of the class. If *Rosamond* had survived the testator, she would on his death have taken a vested interest in a share liable to be increased or diminished by the deaths or births of the children of the brother." And he held that *Rosamond* having died in the lifetime of the testator her share lapsed.

In *Aspinall* v. *Duckworth* (3) the gift was unto and equally amongst the testator's nephew *A.* and the children of his sister *B.*, or their respective executors, as tenants in common; *A.* not

(1) 31 Beav. 323.
(2) 33 Beav. 43, 48.
(3) 35 Beav. 307.

KAY, J.
1882
In re FEATHERSTONE'S TRUSTS.

being a child of *B.*, Lord *Romilly* said it was a gift to a class, and if one of them happened to die in the testator's lifetime the survivors would take the whole, and if only one survived he would take the whole fund.

In the case of *Re Chaplin's Trust* (1) the gift was of residue equally between "all and every the children of my late cousins *A.* and *B.* as shall be living at the time of my decease, *C. D. E.* and *F.*," the named persons being cousins of the testator. *C.* died in the testator's lifetime, and Lord *Hatherley* held that *C.'s* share lapsed. "A gift to a class," he said, "was a gift to a set of persons all filling one common character, or holding some definite position, and a gift to a number of residuary legatees did not thereby constitute them a class. Where there was a gift to children, as tenants in common, this was a gift to a class as tenants in common, the members of the class not being ascertained until the death of the testator. In the same way a gift to executors as such, being made to them in that capacity was a gift to them as a class, and on the death of one of the persons named in the testator's lifetime, his share would not lapse, but go to the survivors." In the case of *Wilson* v. *Atter* (2) there was a direction to divide the residue amongst the children of *A.*, the child of *B.* and *C.*, share and share alike. The child of *B.* having died before the testator it was held that her share lapsed. The learned Judge said: "I can understand a class being described, that is, persons being described by a general description if it be obvious on the face of the will that it was a class to be ascertained at the date of the will, although it was an immediate gift. But it appears to me to be impossible to hold here that the named persons or the described individuals are members of a class in that sense. Of course it may sometimes happen that the testator, simply by way of precaution, has named the individual who is included in the class description, directing that individual to be included; perhaps he may have some doubt as to the legitimacy of the individual or something of that kind, and it may be held that the mere naming of an individual who would otherwise have been included in the class did not alter the rule of construction. But that cannot apply to the case before me

(1) 12 W. R. 147, 148. (2) 44 L. T. (N.S.) 240, 241.

where the individual in question would certainly not be included amongst the children of *A.*, he being a grandchild."

From the last two cases it would seem that in order to constitute a named person a member of a class for this purpose, he must have a common character with the unnamed members of the class, as for example, *A.* and the other children of *B.*

Robert Abbey was not one of the children of Dr. *John Dowson*, and therefore was not in that sense a member of the class, and if the question of lapse depended solely on that consideration I should have great difficulty in distinguishing this case from those two decisions. But the last words of this gift are, "And I direct that the same shall be vested legacies at the time of my decease." And it is argued that these words were intended to mean that the whole residue should be divided amongst such only of the residuary legatees as should survive the testator. Upon consideration, I think that this is the proper meaning to attribute to this sentence. Indeed, it seems to me that unless that be the meaning the words are entirely superfluous and useless, and as I think that the Court is bound to give some effect to them, if possible, and also to construe the will as far as may reasonably be done to avoid an intestacy, I hold that those words sufficiently indicate the testator's intention to give the whole residue to such only of the residuary legatees as should be living at his death.

Solicitors: *Cooper & Walker; Bell, Brodrick, & Gray; Iliffe & Co.*, agents for *Luke Thompson, Middlesborough.*

T. F. M.

KAY, J.
1882
Nov. 4, 11.

In re MILAN TRAMWAYS COMPANY.
Ex parte THEYS.

Company in Liquidation—Claims against Company assigned to Director and again assigned by him—Notice—Misfeasance of Director—Damages—Set-off —Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 165 [*Revised Ed. Statutes, vol. xiv., p.* 238]—*Judicature Act*, 1873, *s.* 25, *sub-s.* 6—*Rules of Court*, 1875, *Order* XIX., *r.* 3.

24 Ch D 492

A company was in 1877 ordered to be wound up. *H.*, who was an original director, and had received eighty-five shares from the promoter, in 1879 obtained from creditors of the company assignments of their claims, and on the 25th of February, 1880, assigned them all for value to *T.*, who gave notice to the liquidator the day following, and was not at the time aware that the company had any claim against *H.* On the 28th of July, 1880, on a summons, dated the 5th of February, 1880, taken out by the liquidator under the 165th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89) against *H.* for damages, for a misfeasance in respect of the eighty-five shares, an order was made for payment by him of the sum of £2000. In 1881 the dividends on these claims against the company were ordered to be paid into Court. On a summons taken out by *T.* for payment out to him:—

Held, that the sum of £2000 was damages and not a debt, and that it was not subject to any equity on the part of the liquidator to a set-off against the dividends, but that *T.* was entitled to them.

Rule 3 of Order XIX., Rules of Court, 1875, was not intended to give rights against third parties which did not exist before; but is a rule of procedure designed to prevent the necessity of bringing a cross-action in all cases where the counter-claim may conveniently be tried in the original action.

THIS was a summons, adjourned into Court, taken out by *Alfred Theys*, that the dividends on certain debts due from the *Milan Tramways Company* might be ordered to be paid to him. These debts were due to various creditors, and were assigned to a person named *Hutter* by several assignments executed between the 29th of October and the 28th of December, 1879. Mr. *Hutter* was, it seemed, also entitled as mortgagee to a claim which Mr. *Thomas Greenhill* had against the company.

On the 12th of January, 1877, the company was ordered to be wound up.

On the 5th of February, 1880, the official liquidator took out

a summons against Mr. *Hutter*, who, it seemed, was one of the original directors of the company, for damages for a misfeasance. On the 25th of February, 1880, Mr. *Hutter* assigned for value all the claims which he had against the company to the applicant *Alfred Theys*, and notice of the assignment was given to the liquidator and to *Thomas Greenhill* on the next day (the 26th of February), and *Alfred Theys* deposed that at the time of the assignment he was not aware of any claim or demand at Law or in Equity on Mr. *Hutter* in respect of the matters so assigned to him or of any incumbrance thereon.

On the 31st of May, 1880, *Alfred Theys* took out a summons in the liquidation to be admitted as a creditor in respect of these claims.

On the 28th of July, 1880, an order was made on the summons for misfeasance against Mr. *Hutter* for payment by him to the official liquidator of a sum of £2000.

On the 4th of August, 1881, the dividends on the debts claimed by *Alfred Theys*, amounting to 11*s.* in the pound, were ordered to be paid into Court, and it was these dividends which he now asked on his summons should be paid to him.

Beddall (with him *W. Pearson*, Q.C.), for *Alfred They's* summons :—

Theys had no notice of the claim by the company against *Hutter* prior to the assignment by *Hutter* to him. *Hutter* never had the legal right to the debts. All that was assigned to him was an equitable right to them, and that right was assigned to *Theys* before there was any right to a set-off, even if it ever existed. *Theys* having had no notice of the claim of the company against *Hutter* was in the position of a purchaser for value without notice.

At the time of the assignment to *Theys* damages against *Hutter* had not been ascertained. There could be no right of legal set-off at all because the debts were not vested in *Hutter*. Had *Theys* been obliged to assert his right by an action it would have been brought in the names of the creditors, and not in the name of *Hutter*. The liquidator could not have said that they were

KAY, J.
1882
In re MILAN TRAMWAYS COMPANY. *Ex parte* THEYS.

indebted to the company. The only answer to the absolute right to sue would have been that some person through whom the equitable right to the debts had passed was indebted to the company.

The 10th section of the *Judicature Amendment Act*, 1875, does not affect the rights of the parties at all. The consideration of the Act may be put aside, and the right claimed to set off looked at as if it had not passed. The case should be treated as if actions had been brought by *Theys* in the names of the original creditors against the company prior to the Act and to those actions there could have been no defence. The attempt by the liquidator to affect the equity of *Theys* cannot, it is submitted, be sustained. An assignee of a legal *chose in action* is subject to an equity as between the assignor and the original debtor, but an assignee of an equitable right to a legal *chose in action* is not subject to any equity between his assignor and the original debtor. A person who purchases an equitable right has a right to assign it, and an assignee who acquires such right without notice of any claim against it acquires the absolute right in this Court. The legal interest was not vested in *Hutter*, but in the creditors. What was assigned by him was merely an equity, and if subject to any equity at all it could only be subject to equities between the creditors and the debtor. At the time of *Hutter's* assignment there was no debt of any kind. It was a case of unascertained or unliquidated damages for an alleged misfeasance or breach of trust which sounds in damages only, and cannot be the subject of set-off. The mere existence of cross-claims gives no right to equitable set-off: *Rawson* v. *Samuel* (1).

Robinson, Q.C., and *Northmore Lawrence*, for the liquidator:—

This case is governed by the decision in *Ex parte James* (2); and *Ex parte Mackenzie* (3) may also be referred to on the question of set-off after a company has been ordered to be wound up; and in this case the order for winding-up was made in January, 1877. *Hutter* was one of the original directors of the company, and he

(1) Cr. & Ph. 161. (2) Law Rep. 8 Eq. 225.
(3) Law Rep. 7 Eq. 240.

received eighty-five shares, which were valued at £2000 at the time when the company was promoted. He obviously got assignments of these debts against the company as a set-off against the demand for the value of the shares. He wished to protect himself, and he had in equity the debts vested in him. By Rules of Court, Order XIX., rule 3: "A defendant in an action may set off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action." The order for the dividends was not made until August, 1881, whereas an order was made against *Hutter* for payment of £2000 in July, 1880. Under Order XIX. claims may be brought forward in defence of a most important kind: *Lees* v. *Patterson* (1). Notwithstanding the order against *Hutter* is still unsatisfied, *Theys* asks that the dividends may be ordered to be paid to him; but considering the whole of the facts, and the effect of Order XIX., rule 3, it is submitted that the liquidator is clearly entitled to a right of set-off. *Young* v. *Kitchin* (2) was also referred to.

Beddall, in reply.

KAY, J., after stating the facts as set forth above, said:—

The liquidator resists this application upon the ground that he is, as he insists, entitled to set off the £2000, for which he has obtained an order against Mr. *Hutter*. But this order was not obtained until long after the assignment by Mr. *Hutter* to *Alfred Theys*, and the notice of that assignment given to the liquidator. Assuming that what the liquidator has recovered was damages and not a debt, there was not at the date of the assignment and of the notice any right of set-off either at Law or in Equity.

Was then the £2000 damages? It was recovered, as I understand, by a summons under sect. 165 of the *Companies Act*, 1862, and was according to the order of the 28th of July, 1880, "the nominal value of eighty-five shares in the company received by Mr. *Hutter* from *Charles Bernard*, the promoter of the company." The ground of the order was, I presume, that this was

(1) 7 Ch. D. 866. (2) 3 Ex. D. 127.

KAY, J.
1882
In re MILAN TRAMWAYS COMPANY. *Ex parte* THEYS.

in the nature of a bribe which it was a misfeasance on Mr. *Hutter's* part to receive. According to *Pearson's Case* (1), the right of the company was to elect whether they would take the shares, and their proceeds if they had increased in value, or the value of them at the time when they were presented to him. The company have elected to take the value. This was not money in his hands. I am not informed whether he ever had any of the value of these shares in the shape of money, but if he had I must suppose it was less than what the company have elected to take. As they have not taken the specific shares it seems to me that the company have insisted on their right to damages or compensation, and that the £2000 was in the strictest sense of the word damages and not a debt. If this be so, then taking the assignment to be subject to equities, it seems to me that there was no equity to which it could be made subject. This is not the case of a liability for a call made in the winding-up which, according to *Ex parte Mackenzie* (2) constitutes a debt from the time of the commencement of the winding-up, but the case seems to me to fall entirely within the decision in *Watson* v. *Mid-Wales Railway Company* (3), where it was held (4) that neither at Law nor in Equity would a set-off be allowed "against the assignee of an equitable *chose in action* . . . . of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed nor in any way referring to it."

An argument which I must especially notice is that since the *Judicature Acts*, 1873 and 1875, under Rules of Court, Order XIX., rule 3: "A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not," and that consequently the liquidator has now this right of set-off, even though he might not have had it before these statutes. In my opinion that rule was not intended to give rights against third persons which did not exist before, but it is a rule of procedure designed to prevent the necessity of bringing a cross-action in all cases where the counter-claim may conveniently be tried in the original action.

(1) 5 Ch. D. 336.
(2) Law Rep. 7 Eq. 240.
(3) Law Rep. 2 C. P. 593.
(4) Ibid. 598.

Sect. 25, sub-sect. 6 of the *Judicature Act* of 1873, making debts assignable at law, preserves "all equities which would have been entitled to priority over the right of the assignee if this Act had not passed," and it therefore does not affect the question which I have had to decide. The summons of *Alfred Theys* must be allowed with costs. The liquidator may take his costs out of the estate.

Solicitors: *Lumley & Lumley; Vallance & Vallance.*

T. F. M.

CHITTY, J.

1882

Nov. 16.

DAVIS *v.* HARFORD.

[1882. D. 376.]

Settled Estate—Power of leasing—Tenant for Life—Infant Remainderman—Trustees—Effectuating Predecessor's Contract for Lease.

By a will devising real estate in strict settlement powers of granting building leases were given to any tenant for life and to trustees during the minority of any tenant in tail. The tenant for life, in pursuance of his power, entered into a contract to grant a building lease, but died without having executed a lease, and was succeeded by an infant tenant in tail:—

Held, that the trustees had power to effectuate the contract of the tenant for life by executing a lease.

SPECIAL CASE.

Philip J. Miles, by his will, dated in 1842, devised his freehold estate at *King's Weston*, in the county of *Gloucester*, to the use of his son *Philip W. S. Miles* for life, with remainder to the use of trustees to preserve contingent remainders; with remainder to the use of the first and other sons of the said *Philip W. S. Miles* in tail male, with remainders over.

The will contained powers of leasing, including a power for any tenant for life in possession, and also for the trustees during the minority of any tenant for life or in tail, by deed to appoint all or any part of the said hereditaments on building leases for ninety-nine years.

Upon the death of the testator in 1845, the said *Philip W. S. Miles* became tenant for life in possession of the *King's Weston* estate, and in July, 1881, he entered into an agreement in writing with the Plaintiff *Davis* to grant him, under the powers of the will, a building lease of part of the estate for ninety-nine years. The Plaintiff thereupon entered on the land and erected buildings thereon pursuant to the agreement.

In October, 1881, the tenant for life died without having completed the agreement by granting a lease, and leaving an only son, *Philip N. Miles*, an infant, who thereupon became tenant in tail.

The Plaintiff having required the trustees to grant him a lease in accordance with the agreement, the question arose whether the trustees, as the persons in whom the powers of leasing were vested during the minority of the tenant in tail, had power to grant a lease simply for the purpose of effectuating a contract entered into by their predecessor in title.

The question was submitted for the opinion of the Court by a special case under Rules of Court, 1875, Order XXXIV. rule 1. It was admitted that the terms of the agreement were in accordance with the power.

Dunning, for the Plaintiff:—

The objection is that the power of leasing, if exercised by the trustees at all, must be exercised in its entirety and not for the purpose of effectuating a contract in pursuance of a previous power; but I submit that the powers should be read together as a single power to be carried into effect by the person who may for the time being be the donee. It is admitted that the agreement itself is a valid exercise of the power; and its terms have been complied with by the lessee. The tenant for life, therefore, had he lived, would have been bound to vest the legal estate in the lessee; and it is difficult to see on what ground the right of the lessee to have the execution of the agreement perfected could be held to have been destroyed merely by the death of the tenant for life. The remainderman, at all events, is bound by the agreement: *Shannon* v. *Bradstreet* (1).

H. M. Mills, for the Defendants, the trustees:—

The donees of a leasing power, upon a lease made by themselves, where they exercise a discretion as to its terms, are no doubt empowered to appoint the property so as to give the lessee the legal estate during the term; but where they exercise no sort of discretion, and all the terms of the lease have, in point of fact, been settled by their predecessor in title, and they are lessors merely in point of form, I submit they have no such power. There is here an absence of privity of contract or of estate

(1) 1 Sch. & Lef. 52.

CHITTY, J. 1882 DAVIS v. HARFORD.

between the proposed lessee and the present donees of the power. It would seem that the power to appoint the use ancillary to a leasing power only applies to cases where the donee himself settles the terms of the lease, and not to cases where those terms have been settled by someone else.

In future, in cases of this kind, the difficulty may be met by the *Settled Land Act*, 1882, ss. 2 (sub-s. 5), 12, and 60, since a tenant in tail apparently falls within the definition of a "tenant for life."

Dunning, in reply.

CHITTY, J.:—

The actual point I have to decide is not covered by direct authority, but the case is a simple one. The tenant for life, who had a power of granting building leases, entered into an agreement with the Plaintiff to grant him a building lease. It is admitted that the agreement was within the power; consequently it was an equitable exercise of the power of leasing. The Plaintiff entered under the agreement and erected buildings on the land. Inasmuch, therefore, as there is a power of leasing in the settlement, and that power has been equitably exercised, all persons entitled under the settlement are bound. The only question is how the legal estate is to be vested in the lessee. There being a perfect equitable title, and all persons entitled under the settlement being bound, the question is whether the parties who have the control of the legal estate, and who can give legal effect to the contract, are authorized to grant a lease. I am of opinion that they have that power, and that they are authorized to grant such a lease. Supposing that the agreement had not been for a lease in accordance with the power it would have been otherwise: but since all parties under the settlement are bound by the equitable contract so as to pass to the lessee the equitable interest, I am of opinion that the persons who have a power sufficient to vest the legal estate are authorized by the power to execute a deed necessary for that purpose.

His Lordship accordingly pronounced his opinion that the

Defendants, the trustees, had power to grant to the Plaintiff a lease in accordance with the agreement, and—the Plaintiff's counsel having moved for judgment—gave judgment for the Plaintiff for specific performance, with costs.

Solicitors: *Merediths, Roberts, & Mills*, for *Osborne, Ward, Vassall, & Co., Bristol.*

G. I. F. C.

C. A.
1882
Nov. 17.

Ex parte WARD. *In re* WARD.

Bankruptcy Petition—Petitioning Creditor's Debt—"Liquidated Sum"—Defaulter on London Stock Exchange—Amount of Differences fixed by Official Assignee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6.

The amount of the differences due by a defaulter on the *London Stock Exchange* (as fixed by the official assignee of that body under its rules) to a *Stock Exchange* creditor, is a "liquidated sum" within the meaning of sect. 6 of the *Bankruptcy Act*, 1869, and will support a bankruptcy petition by the creditor against the defaulter.

THIS was an appeal from a decision of Mr. Registrar *Pepys* acting as Chief Judge in Bankruptcy.

In October and November, 1881, *William Ward*, a stock and share broker, and a member of the *London Stock Exchange*, entered into various contracts with Messrs. *Harris, Goldsmid, & Co.*, stock and share dealers, and members of the *London Stock Exchange*, for the purchase from them of a number of shares in a company called the *Quartz Hill Consolidated Gold Mining Company*, then recently formed. These contracts were entered into on the *Stock Exchange*, and in making them *Ward* was acting as broker for a client. At the time when the purchases were made no special settling-day for the shares of the company had been appointed by the committee of the *Stock Exchange*, but the 28th of December, 1881, was afterwards appointed as the settling-day. In consequence of the failure of *Ward's* client to supply him with funds to pay for the shares, *Ward* was unable to fulfil his contracts with *Harris, Goldsmid, & Co.*, and he was, on the 30th of December, 1881, declared a defaulter on the *Stock Exchange*, and on the same day the official assignee of the *Stock Exchange*, in accordance with its rules, closed all *Ward's Stock Exchange* transactions, and distributed such assets as he obtained in this way among *Ward's Stock Exchange* creditors, but these assets were of very trifling amount. The amount thus fixed by the *Stock Exchange* assignee as due by *Ward* to *Harris, Goldsmid, & Co.*, was £5623.

Harris, Goldsmid, & Co. afterwards issued a debtor's summons

against *Ward* for this amount. *Ward* applied to the Court of Bankruptcy to dismiss the summons, and an order was made staying the proceedings on the summons pending the trial of an action to try the validity of the debt claimed, on the terms of *Ward's* giving security to the amount of £6623. *Ward* appealed from this order, but his appeal was dismissed by the Court of Appeal: *vide Ex parte Ward* (1). He failed to give the security, and a bankruptcy petition, which had been presented against him by *Harris, Goldsmid, & Co.*, on the 24th of February, 1882, was then proceeded with. The petition was founded on the act of bankruptcy committed by his non-compliance with the debtor's summons, and it alleged that *Ward* was indebted to the petitioners in the sum of £5623, "the amount of loss sustained by them by reason of his not fulfilling his contracts with them in respect of certain shares in the *Quartz Hill Consolidated Gold Mining Company* sold by them to him in October and November, 1881." *Ward* objected to an adjudication being made on the ground (*inter alia*) that the Petitioners' claim was not for a "liquidated sum due at law or in equity," but for unliquidated damages for breach of contract, and that, under sect. 6 of the *Bankruptcy Act*, 1869, such a demand would not support a bankruptcy petition. The Registrar overruled the objection, and made the adjudication. *Ward* appealed.

By the rules of the *Stock Exchange* all its members are personally liable upon all contracts which they enter into on the *Stock Exchange*, even though they be really acting as brokers for a principal.

By rule 170, "In every case of failure the official assignee shall publicly fix the prices current in the market immediately before the declaration" (of default), "at which prices all persons having accounts open with the defaulter shall close their transactions by buying of or selling to him such stocks, shares, or other securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to or claimed from the official assignee."

Other rules of the *Stock Exchange* are stated in the report of *Ex parte Ward*.

(1) 20 Ch. D. 356.

C. A. 1882

Ex parte WARD. *In re* WARD.

Davey, Q.C., *Cooper Willis*, Q.C., and *Yelverton*, for the Appellant:—

The debt which the Petitioners claim is not a liquidated sum, and therefore, by sect. 6 (1) of the *Bankruptcy Act*, 1869, it will not support a bankruptcy petition. This point was not decided in *Ex parte Ward* (2). The Petitioners' own description of their debt, as the loss sustained by them by the non-fulfilment of the debtor's contracts with them, shews that the claim is for damages for breach of contract. Those damages are not liquidated till they have been assessed by a jury. The amount of differences which has been fixed by the assignee of the *Stock Exchange* is fixed only for the purposes of the *Stock Exchange* distribution. The original contract between the debtor and the Petitioners still subsists.

[JESSEL, M.R.:—How can there be two contracts?]

If the original contract is gone, the *Stock Exchange* creditors of the debtor ought not to be entitled to anything but what they receive from the official assignee. Rule 170 was intended only to ascertain the amount of the differences which are to be paid to or claimed from the official assignee; not to settle the amount of the debt due by the defaulter to the person who has dealt with him. At any rate, the amount is fixed only for *Stock Exchange* purposes, not for the purpose of legal proceedings.

Winslow, Q.C., and *J. E. Linklater*, for the Respondents, were not heard.

JESSEL, M.R.:—

The only question is whether the demand of the Respondents is for a liquidated sum. By the rules of the *Stock Exchange*, which are binding both on the Appellant and the Respondents, a mode is provided of ascertaining the amount of the differences due by a defaulter. The purchaser in this case became a defaulter, and he must be treated like every other defaulter. It is really as if the rules of the *Stock Exchange* were imported into the contract.

(1) Sect. 6 provides that "the debt of the petitioning creditor must be a liquidated sum due at law or in equity."

(2) 20 Ch. D. 356.

The provisions of the rule must be considered as inserted in the contract, and to that extent they alter the wording of the contract, so that we have the contract altered in this way—that the purchaser is to pay for the shares on the settling-day, provided always, that if he becomes a defaulter before then, the amount due from him is to be ascertained in accordance with the rules of the *Stock Exchange*. If that is so, there appears to be no foundation for the argument that this rule is to be limited to ascertaining the amount to be claimed from the assignee of the *Stock Exchange*. The amount is ascertained for all *Stock Exchange* purposes, that is, for the purposes of the contract. Mr. *Davey* was driven to admit this. By the rules of the *Stock Exchange* a defaulter is called upon to pay a portion of his liabilities if he can, and this is the mode in which his liabilities are ascertained, and he pays accordingly. It therefore appears to me that this demand was for a liquidated sum, and that the judgment of the Registrar is right.

COTTON, L.J.:—

I am of the same opinion. Rule 170 in the case of a defaulter really alters the original contract, and provides a new contract as between the defaulter and his creditor, and then the amount of the liability is fixed and ascertained in accordance with that altered contract. It is said that this is only for the purposes of the *Stock Exchange*, and particularly with reference to the domestic distribution of what I may call the "House Fund." But the difference once ascertained is the difference for all purposes, notwithstanding that the rule only provides for its payment out of a particular fund. In my opinion this demand is for a liquidated sum.

SIR JAMES HANNEN:—

I am of the same opinion.

Solicitor for Appellant: *G. H. Carthew.*
Solicitors for Respondents: *Travers Smith & Braithwaite.*

W. L. C.

C.A.
1882
Nov. 23.

Ex parte WEBSTER. *In re* MORRIS.

Bill of Sale—Renewal of Registration—Affidavit—Statement of Residences of Parties—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 11—*Shorthand Notes of Evidence—Sheriff—Interpleader—Costs.*

The affidavit made on the re-registration of a bill of sale must state the residence of the grantee as it was stated in the bill of sale, even though it was there erroneously stated.

In a bill of sale the grantee was described as of "*Boldock* in the county of *Hereford*," her residence really being at *Baldock* in the county of *Hertford*. The bill of sale was registered, and was re-registered within five years. The affidavit made on the re-registration stated only the true residence of the grantee:—

Held, that sect. 11 of the Act had not been complied with, and that the bill of sale was void as against an execution creditor of the grantor.

Costs will not be allowed of shorthand notes of evidence which are not used on the hearing of an appeal, the decision turning on a question of law.

The order on an interpleader issue between a bill of sale holder and an execution creditor gave the sheriff his costs, to be paid by the bill of sale holder. The bill of sale holder appealed, and by the notice of appeal asked that the sheriff's costs might be paid by the execution creditor. The notice was served on the sheriff, and he appeared by counsel on the hearing of the appeal. His counsel took no part in the argument of the appeal, but only asked for costs. It was not suggested that the execution creditor was not as well able to pay the sheriff's costs as the bill of sale holder:—

Held, that, though it was an error to serve the sheriff with a formal notice of the appeal, he ought not to have appeared on the hearing, and that he was not entitled to any costs of the appeal.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 25th of May, 1876, *Samuel Morris* executed a bill of sale of goods belonging to him in favour of *Ann Webster*, by way of mortgage to secure the repayment, with interest, of the sum of £75 advanced by her to him. In the deed *Ann Webster* was described as of "*London Road, Boldock*, in the county of *Hereford*, spinster." This was a mistake, her real residence being at "*London Road, Baldock*, in the county of *Hertford*." The bill of sale was registered on the 26th of May, 1876. The registration was renewed on the 18th of May, 1881. The affidavit filed on the re-registration was made by *Morris*, and it stated that "a bill

of sale bearing date the 25th of May, 1876, and made between *Samuel Morris* (giving his description as stated in the bill of sale), of the one part, and *Ann Webster* of *London Road, Baldock*, in the county of *Hertford*, of the other part, and which bill of sale was registered on the 26th of May, 1876, is still a subsisting security." So far as appeared from directories and publications of a similar nature there is no such place as *Boldock*, in the county of *Hereford*.

On the 12th of January, 1881, *Morris* filed a liquidation petition under which his creditors resolved to accept a composition. On the 28th of April an order was made by the Court of Bankruptcy dismissing a bankruptcy petition which *E. W. Streeter* had on the 27th November, 1880, presented against *Morris*, and directing that *Morris* should pay the taxed costs of it.

These costs were taxed at £32 18*s*. The amount not having been paid *Streeter*, on the 22nd of June, 1881, issued a writ of *fi. fa.* out of the Court of Bankruptcy for the amount, under which the sheriff of *Middlesex* seized the goods comprised in the bill of sale, which were then in the apparent possession of *Morris*. The goods were claimed by *Ann Webster* under the bill of sale. On the 29th of June, 1881, the sheriff gave notice to *Streeter* and *Ann Webster* of an application to the Court of Bankruptcy for an order that they should appear and state the nature of their respective claims to the goods, and abide by the order of the Court, and ultimately the Registrar decided that *Streeter* was entitled to the goods, and that the claim of *Ann Webster* should be barred, on the ground that the affidavit made on the re-registration did not comply with the provisions of sect. 11 (1) of the *Bills of Sale Act*,

(1) Sect. 11 provides that "The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void.

"The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties as stated therein, and that the bill of sale is still a subsisting security.

"Every such affidavit may be in the form set forth in the Schedule (A.) to this Act annexed."

C. A. 1882

Ex parte WEBSTER. *In re* MORRIS.

1878. The order also directed that *Ann Webster* should pay to *Streeter* and to the sheriff their respective costs of the hearing. From this order *Ann Webster* appealed. The notice of appeal, which was served on the sheriff as well as on *Streeter*, asked that the order of the Registrar might be set aside, and that an order might be made directing judgment to be entered in favour of *Ann Webster*, and that *Streeter* should pay her costs and the costs of the sheriff, of the hearing, and of the appeal.

Cooper Willis, Q.C., and *T. A. Roberts*, for the Appellant:—

The *Bills of Sale Act*, 1854, which was in force when this bill of sale was made, did not require that the residence of the grantee should be stated in the affidavit made on the registration of a bill of sale, nor does the Act of 1878 require that to be stated on the first registration. Sect. 14 of the Act of 1878 gives power to any judge of the High Court of Justice to rectify an accidental misstatement in the register of the "name, residence, or occupation of any person." And it has been frequently held that merely formal errors do not vitiate the registration of a bill of sale: *Hewer* v. *Cox* (1); *Gardnor* v. *Shaw* (2); *Elliott* v. *Freeman* (3); *Ex parte M'Hattie* (4); *Ex parte Kahen* (5); *Blount* v. *Harris* (6). "The Act was intended to give reasonable information to those who deal with persons who have executed bills of sale, but it was not meant to be a mere trap for those who advance money on such securities": *Ex parte Popplewell* (7). The object of the re-registration is to shew that the bill of sale is still a subsisting security, and the object of the affidavit is to identify the bill of sale. The object of registration is to protect the creditors of the grantor, not of the grantee. The description of the grantee cannot, therefore, be material. The affidavit in the present case sufficiently identifies the bill of sale. There being no such place as *Boldock*, it is clear what place is meant. In *Button* v. *O'Neill* (8) it was held that the affidavit made on the registration of a bill

(1) 3 E. & E. 428.
(2) 19 W. R. 753.
(3) 7 L. T. (N.S.) 715.
(4) 10 Ch. D. 398.
(5) 21 Ch. D. 871.
(6) 4 Q. B. D. 603.
(7) 21 Ch. D. 73, 80.
(8) 4 C. P. D. 354.

C. A. 1882

Ex parte WEBSTER. *In re* MORRIS.

must state the residence of the grantor at the time of the swearing of the affidavit, and not at the time of the execution of the bill of sale.

[COTTON, L.J.:—The Act requires that the residence of the grantor shall be stated in the affidavit, it does not say his residence at the time when he executed the bill of sale.]

Sect. 11 is merely directory.

A. G. M. McIntyre, for the execution creditor, was not heard.

T. L. Wilkinson, for the Sheriff.

JESSEL, M.R.:—

The present appeal is really a temptation to make bad law. It is a very hard case indeed. If I could so construe the Act as to decide in favour of the Appellant I should be very much inclined to do so. But that is not the province of a Judge. His duty is to find out the meaning of an Act of Parliament, without regard to the question whether it may not in the particular case produce a result which he may think contrary to the intention of the Legislature. The words of sect. 11 are very plain. It says that if the registration of a bill of sale is not renewed within five years the registration shall become void. Then it says that the re-registration is to be effected by the doing of certain things, and it appears to me that there is no re-registration unless the things mentioned are done. Now, what is to be done? An affidavit is to be filed with the Registrar, stating (*inter alia*) the names, residences, and occupation of the parties to the bill of sale "as stated therein." Consequently, for some reason or other (I am quite unable to say what it is), the Legislature have required that the affidavit shall state the names, residences, and occupations of both the parties to the bill of sale as they were stated in it. And the form of affidavit which is given in the schedule to the Act does not in any way cut down the enactment. In the present case the residence of the grantee as stated in the bill of sale was "*Boldock* in the county of *Hereford*," and that, according to sect. 11, ought to have been stated in the affidavit made on the re-registration. No doubt there was a clerical error in the bill of sale, and the

C. A. 1882 *Ex parte* WEBSTER. *In re* MORRIS. Jessel, M.R.

affidavit might have stated the address given in the bill of sale and then added that it was so stated by mistake, and that the true address was "*Baldock* in the county of *Hertford*," and in that way the Act would have been complied with. Then a suggestion is made that there is no such place as *Boldock* in *Herefordshire*, and that no one would be misled. I cannot say positively that there is no such place, though I suspect there is not, but it does not follow that other people know this. If there is no such place, I cannot impute to all the world a knowledge of that fact. Probably most people would take it to be the real description of the grantee. I cannot therefore say that there is nothing likely to mislead. There is a most material variation between *Boldock* in *Herefordshire* and *Baldock* in *Hertfordshire*. It can only be said that the names are similar. I cannot say that the residence of the grantee stated in the affidavit is that which is stated in the bill of sale. I am sorry to have to arrive at this conclusion, but the words of the Act are clear and I am bound by them.

COTTON, L.J.:—

I am of the same opinion. The sole question is whether the words of the Act have been complied with, not whether injustice will be caused by our decision. If the Act produces injustice it is for the Legislature to set it right. The sole question is whether the description of the grantee in the affidavit is that which is stated in the bill of sale. If there had been a mere mis-spelling of a name—for instance, if "*Boldock*" had been simply put for "*Baldock*," the case would have been very different. But can it be said that in the present case the description of the grantee in the affidavit is in substance the same as that which is given in the bill of sale? There is a substantial difference between them. Thongh I am very unwilling to come to such a conclusion, yet it is our duty simply to construe the Act, and, in my opinion, this is the true construction.

BOWEN, L.J.:—

I am of the same opinion.

McIntyre asked for the costs of a shorthand writer's notes of some

evidence which had been taken in the Court below with the view of shewing that the bill of sale was fraudulent.

JESSEL, M.R.:—Our rule is not to allow such costs unless the evidence is used before us.

Wilkinson:—The costs of the sheriff ought to be paid by the Appellant. The sheriff was served with notice of the appeal, and the notice asked that his costs in the Court below might be paid by the Respondent instead of by the Appellant. The sheriff was entitled to appear and support the Registrar's order.

JESSEL, M.R.:—I think that the sheriff ought not to have appeared. The Registrar's order gave him his costs in the Court below. The Appellant only asked that the Respondent, instead of herself, might be ordered to pay those costs. It has not been suggested that this alteration would be material to the sheriff, or that the execution creditor is not at least as well able to pay the costs as the bill of sale holder. There is not the slightest pretence for the sheriff appearing on the hearing of the appeal. I very much dislike the practice of counsel appearing simply to ask for costs, when they take no part in the argument. It was an error to serve the sheriff with a formal notice of the appeal; a simple notice should have been given to him. But he ought not to have appeared. The appeal will be dismissed with costs as regards the execution creditor, but the sheriff will not have any costs.

COTTON and BOWEN, L.JJ., concurred.

Solicitor for Appellant: *J. E. S. King.*
Solicitors for Execution Creditor: *Smiles & Co.*
Solicitor for Sheriff: *W. Maynard.*

W. L. C.

C. A.
1882
CHITTY, J.
Nov. 3, 6.
C. A.
Nov. 22, 24.

SPENCER *v.* METROPOLITAN BOARD OF WORKS.

[1882. S. 3944.]

Compulsory Purchase—Conditions Precedent—Metropolitan Street Improvements Act, 1877 (40 & 41 *Vict. c. ccxxxv.*)—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 18 [*Revised Ed. Statutes, vol. ix., p.* 633]—*Meaning of Word "take."*

By an Act of 1877, with which the *Lands Clauses Act* was incorporated, the Metropolitan Board of Works were authorized to effect certain street improvements, and by sect. 5 were authorized to "enter upon, take, use, and hold" any of the lands in the deposited plans and books of reference, with the exception of certain specified lands. By sect. 33, after reciting that it was expedient to make provision for the accommodation of such of the labouring classes as would be displaced by the improvements, the Board were directed to acquire or appropriate lands and sell them or let them on building lease for the purpose of the erection of suitable houses for the labouring classes. And it was provided that before the Board should, without the consent of one of the Secretaries of State, "take for the purposes of this Act" fifteen houses or more occupied at the passing of the Act wholly or partially by persons of the labouring classes, they should prove to the satisfaction of such Secretary of State that suitable accommodation had been provided elsewhere for the same number of persons as had been accommodated in the houses to be taken. The Board served on the Plaintiff notice to treat for the purchase of more than fifteen houses belonging to him, which were occupied at the passing of the Act by the labouring classes. The Plaintiff sent in his claim without prejudice to any question as to the right of the Board to exercise their powers before complying with the proviso of sect. 33. The Board then served notice of their intention to summon a jury. It was admitted that the conditions of the proviso had not yet been complied with. The Plaintiff brought his action to restrain the Board from proceeding on their notices till they had complied with the conditions.

Held, by *Chitty*, J., that the word "take" in the proviso was not confined to taking possession, but included purchasing, and that the Board ought to be restrained from taking any steps to acquire a title to the land till they had complied with the conditions precedent. An injunction was therefore granted.

On appeal, *held*, by *Jessel*, M.R., and *Bowen*, L.J., *dissentiente Cotton*, L.J., that as the conditions precedent to taking the Plaintiff's land were conditions which the Board were able and compellable to comply with, the land in question was land which the Board were "authorized to purchase or take" within the meaning of the *Lands Clauses Consolidation Act*, 1845, sect. 18, and that they were entitled to serve a notice to treat and summon a jury.

Held, by *Jessel*, M.R., and *Bowen*, L.J., that the prohibition against "taking" the land till the conditions had been complied with did not prohibit the Board from taking before such compliance any proceeding prior to the conveyance, *Jessel*, M.R., giving no opinion whether they were prohibited from taking a conveyance or only from taking possession, and *Bowen*, L.J. (with whom on this point *Cotton*, L.J., concurred), holding that the getting a conveyance from the landlord without entering into possession came within the meaning of the word "take."

Held, therefore, by *Jessel*, M.R., and *Bowen*, L.J., *dissentiente Cotton*, L.J., that the injunction must be dissolved.

BY the *Metropolitan Street Improvements Act*, 1877 (40 & 41 Vict. c. ccxxxv.), after a preamble reciting that it was expedient that the Metropolitan Board of Works should be authorized to make the new streets and street improvements and other works after mentioned, and reciting the deposit of plans, sections, and books of reference, it was enacted (sect. 2) that the *Lands Clauses Consolidation Acts*, 1845, 1860, and 1869, except sect. 133 of the first Act, and such of the provisions of those Acts as were varied by or excepted from or inconsistent with the now stating Act should be incorporated with and form part of the Act. Sect. 4 provided that subject to the provisions of the Act the Board might, upon the land to be acquired by them under the powers of the Act, and shewn upon the deposited plans, make and carry into execution all or any of the new streets and street improvements mentioned in that section. Sect. 5: "Subject to the provisions of this Act the improvements shall be made only in or upon the lands delineated on the deposited plans and described in the deposited books of reference; and the Board may enter upon, take, use, and hold and acquire easements over such of the said lands as they may deem necessary for the purposes of the improvements and for providing space for the erection of houses and buildings adjoining and near thereto, but nothing in this Act contained shall authorize or empower the Board to enter upon, take, use, or acquire easements over any lands shewn upon the deposited plans lying between *Tothill Street* and *Little Gray's Inn Lane* on the one side, and the north-east side of *Coldbath Square* on the other side." Sect. 6 provided that nothing in the Act should authorize the board to "enter upon, take, or use" any part of the portico or steps of the church of *St. Martin's-in-the-*

C. A. 1882 SPENCER v. METROPOLITAN BOARD OF WORKS.

Fields, though they were numbered in the deposited plans. Sect. 20: "The Board may sell the materials of the houses and buildings which may be purchased or taken by them under the powers of this Act." Sect. 21 authorized the Board, upon giving such notice as therein mentioned, "to enter into and upon the lands authorized to be taken and used as aforesaid, or any of them," for the purpose of surveying and valuing the premises. Sect. 24 provided that in case the Board should become "possessed by virtue of this Act" of any premises charged with land tax they should from time to time, until the works should be completed and assessed to the land tax, be liable to make good the deficiency arising within the parish by reason of any lands "having been taken or used" for the purposes of the Act. Sect. 31 provided that the powers of the Board "for the compulsory purchase or taking" of the lands authorized to be taken by the Act should not be exercised after seven years from its passing, and that if any part of the improvements should not be completed within ten years from the passing of the Act, then on the expiration of that period the powers of the Board for the execution thereof should cease to be exercised.

Sect. 32: "The Board shall not less than eight weeks before they take in any parish fifteen houses or more occupied either wholly or partially by persons belonging to the labouring classes as tenants or lodgers, make known their intention to take the same by placards, handbills, or other general notice placed in public view upon or within a reasonable distance from such houses; and the Board shall not take any such houses until they have obtained the certificate of a justice that it has been proved to his satisfaction that they have so made known their intention."

Sect. 33: "And whereas the making of the street improvements in this Act referred to involves the removal of many houses referred to in the immediately preceding enactment; and it is expedient that provision be made for the accommodation of such of the labouring classes as will be displaced by such removal, therefore the Board in carrying into effect the provisions of this Act shall, subject to the provisions of this Act, from time to time for the purpose of providing such accommodation as aforesaid, acquire or appropriate so much of the lands coloured blue on a

copy of the deposited plans signed by, &c., or such other lands, as one of Her Majesty's principal Secretaries of State shall from time to time deem sufficient, and the Board may, for the purpose of procuring such accommodation, appropriate any lands for the time being belonging to them or which they have power to acquire and not required for any other purpose, and may purchase by agreement such further lands as may be necessary for such purpose. The Board shall, as soon as may be after the acquisition or appropriation of any such lands, sell or let the same upon building lease for the purpose of the erection or adaptation or continuance thereupon of suitable dwelling-houses or lodging-houses for persons of the labouring classes; and the Board shall have full power and authority to make and enter into such contracts and agreements as to them shall seem fit with respect to the sale or letting of such lands or any part of the same, and to the terms, conditions, and restrictions as to the elevation, size, and design of the dwelling-houses to be erected or adapted and continued thereupon for the purposes aforesaid, and to the extent of the accommodation to be afforded thereby." Then followed provisions for reference to one of the Secretaries of State of disputes between the Board and persons wishing to purchase or take leases of the lands as to the terms of such purchase or lease, and for sale or lease of such lands by order of one of the Secretaries of State if the Board failed to sell or let them for three years after the acquisition or appropriation of them; and then came the following proviso.

"Provided always that before the Board shall, without the consent of one of Her Majesty's principal Secretaries of State, take for the purposes of this Act fifteen houses or more, occupied at the time of the passing of this Act either wholly or partially by persons belonging to the labouring classes as tenants or lodgers, the Board shall prove to the satisfaction of such Secretary of State that sufficient accommodation in suitable dwellings has been provided elsewhere upon the before-mentioned lands coloured blue, or upon such other lands as may be approved by such Secretary of State for the same number of persons having regard to the numbers set forth in the schedule to this Act and to the details relating thereto proved before the said Committee and deposited at the Home Office. Provided further, that one of Her Majesty's

C. A. 1882

SPENCER v. METROPOLITAN BOARD OF WORKS.

principal Secretaries of State may, if he think fit, after or even before the Board has acquired any of the said lands so coloured blue, release the Board from the obligations imposed upon them by this enactment with respect to such lands or any part thereof provided the Board substitute in lieu thereof other lands equally available for the purposes described in this enactment."

Sect. 34 provided that nothing in the Act should authorize the Board to take, use, or interfere with any lands vested in the Queen for public purposes or vested in or under the control of the Commissioners of Works without consent of the Commissioners first had and obtained.

Sect. 35 contained a similar provision prohibiting the taking Crown lands under the management of the Commissioners of Woods and Forests without the consent of the Commissioners.

The Plaintiff was owner of sixty-three houses in the parish of *St. Giles-in-the-Fields*, almost all of which at the time of the passing of the Act were occupied wholly or partially by persons belonging to the labouring classes as tenants or lodgers. On the 6th of February, 1882, the Board served the Plaintiff with the usual notice to treat for the above houses. On the 11th of March the Plaintiff delivered a claim for purchase-money and compensation along with a notice that his claim was delivered without prejudice to any question as to the right of the Board to exercise their compulsory powers without having complied with the requisitions of the 33rd section. This it was admitted that the Board had not done; no consent of one of the Secretaries of State to the taking the Plaintiff's houses having been obtained, and accommodation for the labouring classes to the extent required by that section not having been provided. On the 11th of August, 1882, the Board served the Plaintiff with notice of their intention to summon a jury to assess the compensation.

The Plaintiff thereupon commenced the action, asking for an injunction to restrain the Board from proceeding to take all or any of the above messuages until they had obtained such consent or such accommodation should have been provided as were required by the 33rd section of the Act, and from in the meantime taking any further or other proceedings under or in accordance with or consequent upon the above notices respectively.

A motion for an injunction was heard by *Chitty*, J., on the 3rd of November, 1882.

Romer, Q.C., and *J. G. Wood*, in support of the motion, contended that the word "take" in the 33rd section meant "purchase," and that the Board could not unless they obtained the sanction of the Secretary of State serve even notices to treat unless they had complied with the provisions of the section with regard to providing other accommodation.

Ince, Q.C., and *Methold*, for the Metropolitan Board of Works, argued that the word "take" meant "take possession of," and that this might proceed so far as even to obtain a conveyance before complying with the provisions of the section.

1882. Nov. 6. CHITTY, J.:—

This is a motion for an injunction by the owner of houses situate within the district covered by the *Metropolitan Street Improvements Act*, 1877, against the Metropolitan Board of Works in which the Plaintiff asks for an injunction, in substance, to restrain the Defendants from taking the houses in question, unless and until the consent of the principal Secretary of State mentioned in the proviso of the 33rd section to the Act is obtained, or unless and until the other conditions contained in the same proviso have been complied with.

The question has been before me on motion. It is a matter of considerable importance, no doubt, to the Board and to the owners of houses and also to the labouring classes, for whose protection the clause in question has been introduced into the Act. It appears from the schedule to the Act that there are no less than 10,000 of the labouring classes who are dwellers within the area in question. I consider it in a case of this kind of great importance, particularly where there is a statutory period which is running out, to come to a speedy decision on the matter, and therefore it is that I express my opinion at once without waiting for what would probably have have been a more full and ample discussion of the questions raised before me, if I postponed the decision until the trial of the action. The facts are not in

C. A. 1882 SPENCER v. METROPOLITAN BOARD OF WORKS. Chitty, J.

dispute. Under a special Act, which is the *Metropolitan Street Improvements Act*, 1877, the Board have served the ordinary notice on the Plaintiff, who is the freeholder of the houses, that they require to purchase and take the houses for the purposes of the Act, and the Board are now taking steps to summon a jury to assess the amount of compensation. It is admitted that out of the sixty-three houses included in the notice to treat, more than fifteen were at the time of the passing of the Act occupied either wholly or partially by persons belonging to the labouring classes as tenants or lodgers. It is admitted also that no consent of the Secretary of State as is mentioned in the proviso has been obtained, nor have the other conditions of the proviso been complied with. It was admitted also in the arguments before me, and, indeed, could not have been fairly contested, that whatever the conditions are in the proviso to the 33rd section, they are conditions precedent to the taking of the houses for the purposes of the Act, the contest being as to what is the meaning of the phrase taking for the purpose of the Act.

The Plaintiff, as I have said, is the freeholder, his interest, as has been mentioned at the bar, is subject to a long term of years. But nothing turns upon that so far as the question before me is concerned.

Now the general principles of construing an Act of Parliament I need scarcely refer to. There is that which has been called the golden rule, laid down by Lord *Wensleydale* in *Grey* v. *Pearson* (1), and which is cited and concurred in by Lord *Blackburn* in the recent case of *Caledonian Railway Company* v. *North British Railway Company* (2), in which his Lordship, after stating the rule, says very pithily: "Unfortunately in the cases in which there is real difficulty it does not help us much, because the cases in which there is real difficulty are those in which there is a controversy as to what the grammatical and ordinary sense of the words, used with reference to the subject-matter, is." In the same case Lord *Selborne* states the rule of construction in this way (3): "There is always some presumption in favour of the more simple and literal interpretation of the words of a statute, or

(1) 6 H. L. C. 61, 106. (2) 6 App. Cas. 114, 131.
(3) 6 App. Cas. 121.

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other written instrument, and so much as this must, I think be conceded to the Appellants." At p. 122 he says "The more literal construction ought not to prevail, if (as the Court below has thought) it is opposed to the intentions of the Legislature as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." I take it also as a general rule in construing statutes that the same words must be *primâ facie* construed in the same sense in the different parts of the statute.

Now I approach the particular question which I have to decide. The Defendants contend that the meaning of the words "take for the purposes of this Act," at the end of the 33rd section is "take possession." The remark which occurs on that contention is a very obvious one. If that had been the meaning of the Legislature, why should not the word "possession" have been inserted there, and the absence of it is more remarkable, because the legislation which related to persons of the labouring classes or lodgers, apart from this particular enactment, was contained in the 121st section of the *Lands Clauses Consolidation Act*, 1845, which is incorporated subject to certain immaterial exceptions in this Act, and forms part of it. The term "possession" is particularly mentioned in the 121st section. I say, then, it is a remarkable thing if the Legislature intended the word "take" to mean "take possession," that they should not have said so. The Defendants who have put forward this construction have found it necessary to contend also that the Board were entitled (and I will use a phrase which is, for this purpose, as neutral and colourless as it can be) in order to acquire the land to proceed so far as to give the notice to treat, ascertain the purchase-money or compensation and get a conveyance. But they say that the true construction of the section is that although the Board may obtain a conveyance they are not to take possession.

I will now go through a few of the sections, first of the special Act, and then of the *Lands Clauses Act* of 1845, which is incorporated with it for the purpose of seeing, by examining the clauses, what is the meaning of the word "taking." I will state now generally my opinion that the contention of the Plaintiff is right, and that "taking" in this section and in these Acts

C. A. 1882 SPENCER v. METROPOLITAN BOARD OF WORKS. Chitty, J.

includes, at least, purchasing, and that the two terms are nearly always used, or very often used, as alternative expressions, but the term "taking," at least, includes the term "purchasing."

Now the preamble of the special Act seems to shew that land may be taken for the purposes of this Act by purchase. The 4th section, which relates to the power to make new streets, does not use that term, but uses the term "acquire." The 5th section is an important one, because it is upon that that the power of the Board to acquire land turns, and that contains the words "enter upon, take, use, and hold and acquire easements." Now those words are not merely a superabundance of words, such as conveyancers are sometimes supposed to employ, but they all have a fit and appropriate meaning with reference to the *Lands Clauses Act*. "To enter upon," is referred to amongst others in the 85th section. "Take" is the term the meaning of which I have decided. It is noticeable that "purchase" is not there. "Use" is also specially referred to with reference to certain powers of user which the company or the promoters of the undertaking have in the *Lands Clauses Act*. "Hold" is a term put in, no doubt, because they are a corporation, as it is often said that although they may take, they cannot hold lands without a license from the Crown or without a parliamentary enactment. Then the 6th section, which is a proviso against the Board, limiting the powers of the Board, restrains them from entering upon, taking, or using any part of the portico or steps of *St. Martin's Church*. The 21st section, which gives certain additional powers to the Board beyond what would be contained in the *Lands Clauses Act*, to enter upon lands for the purpose of making surveys, uses the terms "enter into and upon the lands authorized to be taken and used." The 27th section, which relates to the Board selling land, speaks of "lands which they may have purchased under the powers of this Act." The 28th section uses the term "acquired." The 29th uses the term "purchased." The 31st, which is a material section, because it limits the time for the exercise of the compulsory powers, enacts that "The powers of the Board for the compulsory purchase or taking of the land," and so on, evidently using the term "taking" either in a sense at least co-extensive with "purchase," or almost, I think I may fairly say, as an alter-

native expression. It is admitted on both sides that the word "take" in the 32nd section has the same meaning in that section and in the 33rd section.

I now proceed to refer to some few sections of the *Lands Clauses Act*. The word "purchase" occurs ten times in the Act, and the term "taking" occurs by itself, but not so frequently. The preamble to the *Lands Clauses Act*, 1845, speaks of an Act which shall authorize the purchase or taking of the lands. The heading of those sections, which follow, including the 6th section, is, "and with respect to the purchase of lands by agreement," and in the body of that section itself the words "authorized to be taken" are found. The 9th section speaks of lands "to be purchased or taken."

The 10th section speaks of lands "authorized to be purchased." The heading of the sections, which commence with the 16th, is, "And with respect to the purchase and taking of lands otherwise than by agreement." The 18th section uses the phrase "purchase or take." The 22nd uses the word "taken" the 28th "purchase" the 49th "purchase," the 58th "purchased or taken," the 68th "which shall have been taken for or injuriously affected by." That section has received a special construction, and I pass by that without making any comment upon it. The 69th uses the phrase "purchased or taken," the 73rd says "taken," the 75th "purchased or taken," the 76th the same, the 80th "purchased or taken," the 81st "purchased." The heading to the clauses commencing with the 84th is "And with respect to the entry upon lands by the promoters of the undertaking," and the phrase used is "required to be purchased." The 85th section contains the term "entering upon and using," the 91st "enter upon and take possession of," the 93rd "purchase," the 96th, which relates to copyholds, says "enter upon and make use of," the 97th says "purchase," the 98th says "required to be taken," the 108th "purchase," the 123rd is "purchased or taken," and the 124th is "authorized to purchase." In the Act of 1869, which is incorporated, the term is "taken." I have gone through the sections somewhat rapidly. I have not stayed to state the effect of each section, as that would occupy far more time than would be necessary in delivering judgment upon this motion. I have come to

C. A. 1882 SPENCER v. METROPOLITAN BOARD OF WORKS. Chitty, J.

the conclusion that the Plaintiff is right in saying that there is a meaning assigned by these enactments to the term "taken" which is at least equivalent to "purchase," that is to say it includes purchase, if it does not mean something more. If there be any distinction between the two terms, "take" I will say is the stronger.

Now I proceed to deal with the 33rd section itself. Undoubtedly this section is introduced for the benefit of the labouring classes. It begins with a recital which shews the main object of the enacting part—I am not at liberty of course to cut down the enacting part by the recital unless the enacting part is in itself ambiguous. The recital is, "And whereas the making of the street improvements in this Act referred to involves the removal of many houses referred to in the immediately preceding enactment, and it is expedient that provision be made for the accommodation of such of the labouring classes as will be displaced by such removal." With reference to that recital it was during the argument contended, but not persisted in, that what was being dealt with by the proviso, which I shall read in a moment, was the removal of houses, not the mere displacement of the labouring classes by removal. Then the section goes on to provide this in substance, first it contains a provision under which the Board is bound to take steps for providing elsewhere accommodation for the labouring classes who may be displaced. The labouring classes who are protected by the section, as appears clearly by the proviso, are those who occupy at the date of the Act. I mean that is the form in which the Legislature has thought right to afford protection to the labouring classes, lest anything should be done by the landowners in the interval between the taking of the land and the passing of the Act.

The enacting part of the 33rd section, the object of which I have given but a sketch of, runs thus: (I will read it shortly): "The Board shall subject to the provisions of this Act from time to time, for the purpose of providing such accommodation as aforesaid, appropriate or acquire so much of the land coloured blue on a copy of the deposited plans," signed by a certain person named, "or such other lands as one of the principal Secretaries of State shall from time to time deem sufficient, and the Board may

for the purpose of procuring such accommodation appropriate any lands for the time being belonging to them or which they have power to acquire and not required for any other purpose." That imposes the obligation on the Board to acquire the lands coloured blue, which on referring to the plans, and as has been stated to me in the course of the argument with undoubted correctness, are occupied largely by the labouring classes. The Board say they are bound to acquire or appropriate the lands coloured blue, or some other lands which would in the opinion of the Secretary of State be an equivalent for them. I need not stay to consider the meaning of the word "appropriate" here, but when they have acquired the lands they are bound to proceed to let the same upon building leases for the purpose of the erection or adaptation, and continuing thereupon suitable dwelling-houses or lodging-houses for persons of the "labouring classes." Now that so far shews that what I have stated is correct, that the earlier part of this section only binds the Board to take steps for the purpose of making the purchase. When the proviso is read it will be found that it goes further, and requires them with reference to the taking of houses, to the extent of fifteen or upwards of the class that is mentioned, to make actual provision before they take, unless they comply with the particular conditions which I will mention.

The proviso is, "Provided always that before the Board shall without the consent of one of her Majesty's principal Secretaries of State, take for the purposes of this Act fifteen houses or more occupied at the time of the passing of this Act either wholly or partially by persons belonging to the labouring classes as tenants or lodgers, the Board shall prove to the satisfaction of such Secretary of State that sufficient accommodation in suitable dwellings has been provided elsewhere upon the before mentioned lands coloured blue," or upon such other lands (I will read this shortly) as shall be substituted for them. Then at the end of the section there is a further provision under which on certain conditions, that is, on the Board substituting in lieu other lands equally available for the purpose of the enactment, the Secretary of State is enabled, even before the Board has acquired any of the land coloured blue, to release the Board from the obligations

C. A. 1882 SPENCER v. METROPOLITAN BOARD OF WORKS. Chitty, J.

contained in the section. It is a fair observation on that proviso that it extends to the land coloured blue; in other words, that the Board cannot take even the lands coloured blue, which they are bound to take under the preceding part of the section, unless they have obtained the consent of the Secretary of State, or proved to his satisfaction that sufficient accommodation is provided elsewhere.

Then the Board in arguing on this section say that unless their construction be adopted there will be a deadlock; they are bound to take the blue land, and yet the section disables them from taking it. But that argument it appears to me is not well founded, because with the consent of the Secretary of State they may take fifteen houses, or any sets of fifteen houses, or more as may be required, and the Legislature has given this power to consent to a high officer of the State who is responsible to Parliament, and it is not to be presumed that in a proper and fitting case the Secretary of State will withhold his consent. Therefore it is not right to say that the section is unworkable. There is a discretion conferred upon the Secretary of State, which I take it the Court must hold, on the construction of this Act, would be always exercised in a proper case in the way it ought to be.

Then, again, if the consent is not obtained sufficient accommodation in suitable dwellings may be provided by the Board elsewhere, and when they have proved that to the satisfaction of the Secretary of State they are relieved by the substance of this proviso from the condition which requires them not to take unless that proof has been supplied. And it may be, and as I understand it is so, in reference to the area covered by this Act that they could take other houses which are not occupied by the labouring classes.

Now I have gone through the construction of this statute at some length, because I consider the question to be one of considerable importance. I see no ground for cutting down what I consider to be the true meaning on the construction of the rest of the phrase in question.

It is said that this will be going beyond the necessity of the enactment, and that sufficient protection will be afforded to the

labouring classes if I hold that "take" means "take possession." It may be that sufficient protection would be afforded, but to my mind a greater protection is afforded by the construction which I think I am bound to put upon the section, which really presents a bar to the Board taking houses of this description unless they comply with this provision, in other words, it stops them at an earlier period.

Then it is suggested perhaps rather than argued that the landowner is not entitled to complain, because these provisions are introduced for the benefit of the labouring classes. But the answer to that seems to me to be clear. It is settled now that on a notice to treat being given by the promoters of an Act of Parliament they cannot recall that notice without the consent of the landowners. It is settled that when the compensation has been ascertained according to the provisions of the Act the relation of vendor and purchaser subsists between the parties, so much so that either party can obtain a judgment of specific performance against the other. That principle is to be found in a judgment of the present Master of the Rolls in the case of *In re Pigott and Great Western Railway Company* (1).

Then the landowner says, if the jury should assess this compensation you will be the equitable owner of the land, you will have acquired the land, so that if I should die before the purchase-money is paid it would belong to my next of kin instead of belonging to my heir; you have no right according to the construction of this section to take my land from me for the purposes of the Act, because *non constat* you will ever comply with the condition, in other words, ever obtain the consent of the Secretary of State or prove to his satisfaction that sufficient accommodation is provided elsewhere according to the conditions mentioned in the Act. It seems to me, therefore, that the Plaintiff, the landowner, is entitled upon ordinary principles to raise this contention.

I have therefore come to the conclusion that the construction which I put upon these words is one which the words themselves require, and that there is no sufficient argument of convenience nor any sufficient ground for saying that the construction is

(1) 18 Ch. D. 146.

C. A. 1882

SPENCER v. METROPOLITAN BOARD OF WORKS.

absurd, or for departing from what I consider to be the fair meaning of the words in question.

Therefore the Plaintiff is entitled to the injunction as asked.

G. M.

C. A.

The Board appealed, and the appeal was heard on the 22nd and 24th of November, 1882.

Sir *H. James*, A.G., *Ince*, Q.C., and *Method*, for the Appellants:—

The Plaintiff contends that the Board could not take any steps towards acquiring his land till they had provided accommodation for the labouring classes in manner prescribed by the statute 40 & 41 Vict. c. ccxxxv., s. 33. The contention of the Board is that they may do everything short of taking possession, and that it is enough if they provide the requisite accommodation before they displace the tenants. The question turns on the meaning to be given to the word "take" in that clause. The case is important, as most recent Acts for the execution of public works in populous districts contain similar provisions. The preamble to the clause shews that the enactment was not intended for the protection of the landlord but of the labouring classes of the neighbourhood, and regard must be had to that in construing the clause. Mr. Justice *Chitty* considered that as the *Lands Clauses Consolidation Act* was incorporated with the special Act the word "take" in the special Act must be construed to mean "purchase." That we submit is not a correct view. The word must be construed in the special Act according to the context of that Act. The word occurs first in the preamble, but not in such a context as to throw much light on its meaning. In sect. 5 it occurs between the words "enter upon" and "use and hold," and is best interpreted as referring to taking possession. So in sect. 6. By sect. 20 the Board are empowered to sell the materials on the lands taken—which can only apply to property of which possession has been taken. In sect. 21 the use of the word is more doubtful, but in sect. 24 it is manifestly not used in so wide a sense as that attributed to it by Mr. Justice *Chitty*. Sect. 32 is important. According to the Plaintiff's contention the Board

must under that clause before serving a notice to treat give to the tenants eight weeks' notice of their intention to take the land. Now the object of giving them notice evidently was to give them time to obtain accommodation elsewhere. The object of the section was to protect the tenants not the landowner, he is only entitled to such notice as is provided for by the *Lands Clauses Act*. Now to give notice to the tenants eight weeks before the notice to treat is served would place them in a most uncomfortable state of uncertainty. After a notice to treat is given the proceedings often go on for a year before completion; and so the tenants would, for no useful purpose, be unsettled for more than a twelvemonth before the Board could take possession. It is no protection to a tenant that he should have notice before the notice to treat is served on the landowner, but if we construe the clause as meaning that the occupants shall have eight weeks' notice before their possession is disturbed it is a reasonable and beneficial enactment. The enactment ought to receive a reasonable construction in furtherance of its express object, according to the canons of construction laid down in *Harding* v. *Preece* (1); and, moreover, this is giving to the word "take" its natural meaning, which is a complete taking, including possession. The *Artizans and Labourers Dwellings Improvement Act*, 1875 (38 & 39 Vict. c. 36), throws light on this Act, and may be referred to according to the principle laid down by Lord *Selborne* in *Metropolitan District Railway Company* v. *Sharpe* (2).

[COTTON, L.J.:—I do not see how we can construe a word in one statute by reference to its use in another, in which the context may be different.

JESSEL, M.R.:—I do not think that Lord *Selborne* intended to lay down any such general rule as you suggest. I think you cannot refer to the other Act.]

Then as to the incorporation of the *Lands Clauses Act*. Mr. Justice *Chitty* appears to be in error in supposing the word "take" to be there uniformly employed in the sense he supposes. The clauses relating to the taking of land otherwise than by agreement are sects. 16–68. In sect. 68 the word "taken" is used in

(1) 9 Q. B. D. 281.

(2) 5 App. Cas. 425.

C. A. 1882 — SPENCER v. METROPOLITAN BOARD OF WORKS.

a way which shews that possession must have been taken, and in *Burkinshaw* v. *Birmingham and Oxford Junction Railway Company* (1) it was held that "taken" in that clause meant actually taken into the possession of the company. In *Barker* v. *Metropolitan Railway Company* (2) that decision is approved. Notice to treat does not form a step in the compulsory taking of land. It is indeed a necessary preliminary to the compulsory taking, but is not in itself an exercise of the compulsory powers, as was decided in *Guest* v. *Poole and Bournemouth Railway Company* (3), where Mr. Justice *Willes* said that it was "a neutral proceeding." Then the proviso in sect. 33 appears to apply only to powers as to the blue land, for the accommodation is to be "elsewhere."

[JESSEL, M.R.:—I think the preamble to sect. 33 decisive against that construction.]

It is absurd that the Board should be obliged to provide accommodation before the notice to treat is given, which would often be a year before the tenants could be turned out. A notice to treat is not equivalent to a demand of possession: *Reg.* v. *Stone* (4). The question is one in which the landlord has no interest; the proviso was intended merely to protect the tenants, and provide that they should not be turned out before accommodation was provided.

Romer, Q.C., and *J. G. Wood*, for the Plaintiff:—

The contention of the Board is that they may before complying with the conditions precedent do everything short of taking possession. If that be so, they might complete a purchase and yet never be able to enter into possession, and the landowner would have been obliged to part with his land against his will to no purpose.

[JESSEL, M.R.:—I do not think that the notion that the Board would not perform their statutory duties can be considered to have influenced the Legislature.]

The construction of the section contended for by the Board will not give effectual protection to the labouring classes.

Now, as to the meaning of the word "take," it does not mean

(1) 5 Ex. 475.
(2) 17 C. B. (N.S.) 785.
(3) Law Rep. 5 C. P. 553.
(4) Ibid. 1 Q. B. 529.

take possession of, and does not always include taking possession. "I have taken a house and shall enter next Michaelmas," would be quite correct. The word is a wide one, and means acquire title, either by purchase or otherwise. In sect. 5 we say that it has that meaning, and is not confined to taking possession.

[JESSEL, M.R.:—I do not think that it is so confined, but does it not mean take in the physical sense—acquire ownership with possession?]

In sect. 6 it appears to be used in the sense of acquire title, and so in sects. 20 and 21. In sect. 31 it is used without reference to acquiring possession. Sect. 32 is quite sensible without confining the word "take" to taking possession.

[JESSEL, M.R.:—That section seems to me to make against you. It would be absurd to require notice to be given to a body of labourers two months before a notice to treat can be served on the landlord.]

Suppose an Act says that a company shall not take the lands of *A. B.* till certain conditions have been complied with. Is *A. B.* to be liable to the expense and annoyance of going before a jury to assess compensation when it is not known that the company will ever be in a position to complete. A railway company whose capital has not been subscribed is not allowed to put its powers in force, and this case is analogous.

[JESSEL, M.R.:—Why may they not do everything but complete? The Act does not say that they shall take no proceedings, and there is no taking till completion.

COTTON, L.J.:—Can it be said that these are lands which the Board is authorized to take until the conditions have been complied with.]

As to sect. 33, the word ought to be taken to have the same meaning as in the previous sections. Now in the former part of the Act the word has been used several times. In two of those cases it has unquestionably a broad meaning, and there is nothing in any case to confine it to taking possession. The same remarks apply to its use in sects. 34 and 35. We therefore must give it a wide meaning in sect. 33, unless there is something in that

C. A. 1882

SPENCER v. METROPOLITAN BOARD OF WORKS.

section to narrow its meaning, which there is not. If the Legislature had meant "take possession," it would have said so.

Then as the *Lands Clauses Act* is incorporated, the use of the word in that Act bears upon its meaning in this Act. Neither in the preamble to sect. 16 nor in the enacting parts of the Act which relate to taking land, is the word "take" confined to taking possession, or to an actual physical taking. In that preamble and in sects. 16, 18, 58, 63, 69, 73, it is used in the sense of acquiring title to, and this is according to the popular use of the word. Sects. 80, 84, confirm this. Where temporary possession is spoken of the word "enter upon" is used, and in no case where physical possession was clearly intended is the word "take" used alone. In sect. 96, where physical possession was intended, we have the words "enter upon and make use of." In sect. 98 where physical possession was not intended, the word "take" alone is used. Looking then at the *Lands Clauses Act* as a whole, we find "take" used in a wide sense, that of acquiring title. As regards *Burkinshaw* v. *Birmingham and Oxford Junction Railway Company* (1) it was justly observed by Mr. Justice *Chitty* that it turned on a special section which required a special interpretation: *Guest* v. *Poole and Bournemouth Railway Company* (2) really does not bear on the case. Although there are peculiar dicta in some of the old cases as to the construction of statutes it is now settled that they are to be construed on the same principle as any other documents, *Grey* v. *Pearson* (3): *i.e.*, according to the ordinary meaning of the words, unless a manifest absurdity results. Now the primary meaning of the word "take" and the scope of the enactments are in our favour. The Board ought not to be allowed to go on making the Plaintiff incur costs which may be useless, as the Board may never become entitled to take possession. The 33rd section was intended not only for the benefit of the working classes but of the landlord, and moreover, unless the landlord can put a stop to proceedings until the requisite provision for the working classes is made, there will be no one to protect them, as they cannot institute proceedings and take care of themselves.

(1) 5 Ex. 475. (2) Law Rep. 5 C. P. 553.
(3) 6 H. L. C. 61.

Ince, in reply :—

Both in our special Act and in the *Lands Clauses Act*, what is authorized is the getting possession of land. The Legislature speaks of the authority to acquire the land as an authority to take, *i.e.* to take possession, because that is the ultimate thing —purchase is a means to that end, and the *Lands Clauses Act* therefore throughout speaks of "purchase" and "taking" as different things. As regards sect. 33 of the special Act, the preamble shews the object of it. The houses for the labouring classes are to be built by other persons, not by the Board, and if the Board cannot give a notice to treat till accommodation for them is provided, the giving of notice to the occupiers of the houses will be nugatory ; for long before the Board gets possession the new houses will have been filled by other tenants. The Respondents give an unnatural meaning to the word "take." If a person agreed to take a house in a particular locality he could not be considered to have fulfilled his agreement by purchasing a house which was subject to a lease for thirty years.

[COTTON, L.J. :—The Secretary of State has power to dispense with the provisions of the Act.]

That can only have been intended to meet special cases, and he would not readily exercise that power. If the Plaintiff's construction be adopted the working of the Act will be rendered impracticable.

JESSEL, M.R. :—

I must say that whoever is responsible for the drafting of clauses 32 and 33 in this Act of Parliament has taken a great deal of trouble to raise a very difficult question when he might with the greatest ease by using appropriate and well known terms have avoided any question whatever. Nothing could have been easier than to have said "shall not enter upon," if that was what the Legislature intended. Nothing could have been easier than to say "shall not exercise the power of compulsory purchase" if that was the meaning of it. Instead of this he has used a term raising a question which, having before me the judgment of Mr. Justice *Chitty*, and knowing the opinion of one of the Lords

C. A. 1882 SPENCER v. METROPOLITAN BOARD OF WORKS. Jessel, M.R.

Justices upon the subject, I cannot but admit to be one of very great doubt and difficulty, and although I have arrived at a conclusion on the subject, it would be wrong for me to say that any one who arrives at a different conclusion is in error.

The first observation to be made on sect. 33 is that we ought to find out its meaning if we can from the section itself. If we can do that we need not have recourse to the use of the word "take" in the other sections of the Act. If we cannot, then I agree with the principle which was laid down by Mr. Justice *Chitty*, that as a general rule a word is to be considered as used throughout an Act of Parliament in the same sense, and that therefore we may look through the other sections to see in what sense the word is there used.

The section in question involves three things. There is, first of all, a recital to shew what is intended to be provided for, which in substance may be read thus, "Whereas the making of the street improvements in this Act referred to involves the removal of many houses occupied by the labouring classes, and it is expedient that provision be made for the accommodation of such of the labouring classes as will be displaced by such removal," that is, not for the accommodation of the individuals displaced but of the class—if houses inhabited by the labouring classes are taken away an equivalent amount of accommodation for the labouring classes is to be provided. That points out the object of the section. But how is that object to be attained? The section goes on to enact that the Board shall from time to time for the purpose of providing such accommodation acquire or appropriate certain lands. No time is fixed, and it no doubt would be implied that it must be done within a reasonable time, and it is to be done from time to time so as to enable the Board to supply accommodation equivalent to that of which the labouring classes will be deprived by the removal of the houses in which they dwell. Then, as soon as the Board acquire these lands they are to let them for building purposes, so as to get suitable dwelling-houses or lodging-houses for persons of the labouring classes. Then, after some other provisions which I need not notice, there is a proviso that if they do not sell or let the land for this purpose within three years after acquiring or appropriating it, the

Secretary of State may interfere and order the land to be let or sold. Therefore, having acquired the land within a reasonable time they have three years to let or sell it and get the houses built, and if they do not then the Secretary of State is to intervene.

Now we come to the proviso in question.

[His Lordship read the proviso down to the words "deposited at the Home office."]

Then it is provided that one of Her Majesty's principal Secretaries of State may, if he thinks fit, dispense with the restriction. The words of this proviso simply prohibit the Board from "taking." The Plaintiff's contention is that it prohibits them from exercising any of their compulsory powers, and from taking any proceedings to acquire the houses until the condition has been complied with. That is not the natural meaning of the words of the proviso, and if we are to construe them in that way we must find something in the other parts of the Act to authorize that construction. Now, if we look at the 31st section of the Act we see that the draftsman knew perfectly well the difference between exercising powers and taking—for that section provides that the powers of the Board for the compulsory purchase or taking of lands authorized to be taken by the Act shall not be exercised after seven years from its passing. Those are not the words with which we have to deal. The proviso in sect. 33 simply says "before the Board shall take." Now what does "take" mean? I agree that it may be used in two senses, it may mean actual taking, that is, taking possession of, or it may mean acquiring a title. In the *Lands Clauses Act*, which is incorporated in this Act, it is generally used in the latter sense of acquiring title, that is a complete title, though it is occasionally there used in the former sense. There is nothing in the word "take" which makes an enactment that the Board shall not "take" extend to prohibit it from proceeding with all the necessary steps for thereafter acquiring a title. Every possible meaning of the word is satisfied by holding the proviso to mean that the Board shall not acquire a complete title. I do not think it necessary for the present purpose to decide whether it means that they shall not get conveyances, or that they shall not get possession, for whichever of

C. A. 1882

SPENCER v. METROPOLITAN BOARD OF WORKS.

Jessel, M.R.

those meanings is given to the word "take" I can find no prohibition as regards any proceeding prior to the completion of the title, that is to the conveyance. I may remark, though the observation is not of any great importance, that the 34th and 35th sections shew that the draftsman knew how to express himself sometimes very clearly. The 34th section says, "that nothing contained in the Act shall authorize the Board "to take, use, or in any manner interfere with," any of the lands therein mentioned, and the 35th section is expressed in the same way.

We have not, then, any express words in the Act itself to prohibit what the Board are now doing. What do we find in the *Lands Clauses Act* which is incorporated with it? An authority to serve a notice to treat is given by sect. 18 of the *Lands Clauses Act*, which provides that "when the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special Act, or any Act incorporated therewith, they are authorized to purchase or take," they are to give certain notices. The question then comes to this, are they authorized by the special Act to purchase or take the houses in question? If they are, then the 18th section enables them to give the notices and to proceed under them. It appears to me that on the terms of the special Act there is no doubt that they are authorized to take these houses.

[His Lordship read the 5th section empowering the Board to enter upon, take, use, and hold, and acquire easements over such of the lands delineated on the plans and described in the books of reference as they might deem necessary for the purposes of the improvements, with the proviso excepting the lands near *Coldbath Square*:]—Then the 6th section says, that nothing in the Act shall authorize the Board to enter upon, take or use any part of the portico or steps of *St. Martin's-in-the-Fields*, though they were numbered on the deposited plans, so that the authority is taken away as regards certain property. These houses are delineated on the plans and described in the books of reference, and are not within the exceptions mentioned in sects. 5 and 6, and it appears to me to be plain that unless we find something to take away the authority given by the 5th section, the Board are authorized to take these houses. If this authority is taken away at all, it must

be taken away by the proviso to sect. 33. I have already said that they are not in express terms prohibited from proceedings with a view to taking the houses; if, therefore, they are so prohibited at all it must be by implication. But why should such an implication be made. A proviso that you shall not take does not prevent your proceeding with all the steps preliminary to taking. It seems to me that it is a fallacy to say that the Board are not authorized to take the houses because a condition precedent to completing their title has not been complied with, where the condition depends on an act which the Board themselves can do. As regards any lands which the Board is entitled to purchase, it cannot under the Act of Parliament enter upon them or use them without paying or depositing the purchase-money, or making a deposit and giving a bond under the 84th section of the *Lands Clauses Act*. The enactment that they cannot be entered upon or used without performance of the preliminary condition does not prevent the Board from being authorized to take them within the meaning of the *Lands Clauses Act*. The Board cannot get a conveyance nor, except in the case provided for by sect. 84, enter upon or use them without payment or deposit of the purchase-money. It does not appear to me that the existence of a condition precedent to getting a conveyance of or entering upon and using prevents the lands from being correctly described as lands which the Board are authorized to take under the special Act, where the condition is one which the Board itself can always comply with. The case is very different where the promoter cannot himself remove the difficulty. Here the appropriation of land to provide accommodation for the labouring classes is within the power of the Board, and the same consideration applies to such a condition as applies to the condition precedent of paying or depositing the purchase-money. It seems to me that this condition precedent does not prevent these houses from being considered as houses which the Board are authorized to take.

There is one more consideration, which I think makes the case stronger. In the case of an ordinary company the power of taking lands depends on the payment of the purchase-money, but there is nothing to oblige the company to give a notice to treat. Here it is compulsory on the Board to acquire these lands and

C. A. 1882 SPENCER v. METROPOLITAN BOARD OF WORKS. Jessel, M.R.

get the houses built—they have no option. This seems to me to shew that the Legislature could not have considered that they were not to go on with all their steps at the same time. There is, I have no doubt, a mode of compelling them to perform the obligation laid upon them, but independently of that consideration it must be recollected with what sort of a body we are dealing. It is a body which is directed to do certain works. Can it be supposed that the Legislature contemplated that that body would disobey its express enactment, and refuse to do those works, even supposing that there was a doubt as to there being any legal power of compelling them to do so, a doubt which I, for my part, do not entertain? That being so, it appears to me to be a very strong thing to say that the Board are not authorized to take the lands, because before they take them they must do something else which the Act orders them to do.

There are some other considerations which have had some weight with me, although they are not so decisive as those which I have mentioned. The first is the question of time. If the construction contended for by the Respondent is adopted, not only must the blue or other land be acquired, but the houses for the accommodation of the labouring classes must be built before the Board can take any step towards the purchase of the Plaintiff's houses; now it is obvious that it will take a long time to acquire the land, then to let it, and then to get the houses built. I should say that three years would be a very moderate time. Three years is the limit for the letting of the land, and the whole time given for compulsory purchase is seven years. It does not appear to me to be probable that the Legislature in giving the seven years intended to cut off so large a proportion as this by means of the condition precedent. This consideration has some weight with me.

It was urged that the Respondent's construction enables the landlord to give protection to the labouring classes. But if the landlord keeps his houses until accommodation is provided he can protect them most effectually by letting lodgings to them. It does not appear to me, therefore, that the labouring classes are better protected by adopting the construction contended for by the Respondent. But I cannot imagine that this proviso was

put in for the purpose of enabling the house owner to protect the labouring classes. It seems to me that it was put in to protect those classes, and not to enable the house owners to protect them. This, however, is a minor point, and I do not think that we ought to give weight to such considerations in construing the Act, more especially as a dispensing power is given to Her Majesty's Secretary of State, so that any extreme or unusual hardship, or any inconvenience, can be obviated. I mention them, however, because they have had some influence with me in considering the argument as to convenience, but of course that argument ought not to prevail unless as a last resource.

For these reasons it appears to me that the injunction granted by the Court below cannot be sustained, but must be dissolved.

COTTON, L.J.:—

I have the misfortune in this case to differ from one if not both of the other members of the Court of Appeal. But I have formed a decided opinion on the question, and therefore I do not hesitate to express it.

The question is, whether the Defendants are authorized by their special Act and by the *Lands Clauses Act* to take the proceedings which they are now adopting for the compulsory acquisition of certain houses and land belonging to the Plaintiff. Under sect. 18 of the *Lands Clauses Act* the land as to which they can give notice to treat is described as land which they are authorized to purchase or take. We must then look to the special Act, because it is the special Act which authorizes them to purchase or take. Sect. 5 of the special Act is the first section which refers to the taking of land; and undoubtedly if we look to that section alone, the Defendants can say that these are lands which they are authorized to purchase or take. But we must not look to that section alone. When we have to inquire whether under the circumstances authority is given to a public body to take a man's land against his will we must look to the whole of the Act of Parliament under which they are purporting to act. The section which raises a difficulty in their way, and in my opinion an insuperable difficulty, is the 33rd section of the special Act, the proviso in which has been so often

C. A. 1882 SPENCER v. METROPOLITAN BOARD OF WORKS. Cotton, L.J.

referred to. [His Lordship stated the proviso.] The object of of this proviso is to provide an equivalent amount of accommodation, not for the occupiers of the houses which are taken, but for labourers of the same class, in order that there may not be a deficiency in the metropolis of accommodation for that class. I quite agree that if one construction would be effectual for obtaining that object while the other would not, the words ought to be construed as far as possible in the way which would carry into effect the purposes of the section. But I can see nothing whatever in the view taken by the Judge of the Court below which is inconsistent with the purpose and object of the section. That object, as it appears to me, may be attained as effectually (and possibly more effectually) by the construction which has been put upon the section by Mr. Justice *Chitty* as by that which is contended for by the Appellants. It is very true that if before they take possession other houses are built with equivalent accommodation that will effect the object. But is the object less effected by saying that before they can put in force their compulsory powers to take the land and acquire it, they shall provide the same accommodation? Probably it is more effectually provided for by the latter interpretation. But I do not go upon the effect or consequences. I only say that there is nothing in the view taken by Mr. Justice *Chitty* which is inconsistent with the object of the section which we have to construe.

Before I go into the construction of the section I will deal with one objection which was urged by the Attorney-General, that the Plaintiff here has no interest in the matter provided for by the section. I do not consider it necessary to say that the landowner was intended to protect the labouring classes, or that the proviso was intended to protect the landowner, but in my opinion every one has this interest, that he is entitled to come to this Court if he is unwilling to part with his land, and to say, I will not be compelled to part with my property unless the body which is trying to take my land has at this very time parliamentary authority to take my land from me. Without referring to the question whether the proviso was intended to protect the landlord or not, if it is the fact that on its true construction it takes the land out of the category of lands authorized to be

taken, the Plaintiff has this interest in the section—he can say that his land shall not be taken from him against his will unless the provisions of the section are complied with.

Can it be said that taking the landlord's title is not taking for the purposes of the Act? Taking possession no doubt it is not, but it is taking. If there is nothing in the rest of the Act inconsistent with this view I think that "taking" is not confined to taking possession, but extends to any taking, including the taking the landlord's title.

Then if that be so, is the land within the compulsory clauses of the Act? as "lands authorized to be taken." It is conceded that this land cannot at the present moment be used without the consent of the Secretary of State for the purpose of constructing these improvements until houses have been built providing equivalent accommodation for the labouring classes. How then can we say that it is at the present moment land authorized to be taken by the 5th section when we find in that section the words together, "enter upon, take, use, and hold." Can it be said that the Board are authorized to take the land when at this moment they cannot use it? It has been decided that when the power to use land has expired, the power of taking compulsorily cannot be exercised. In my opinion the same rule ought to be applied when the power to use has not arisen. It is said that it is like the case of purchase-money, and that no railway or other body can enter upon lands which their special Act authorizes them to take until they have paid the purchase-money, and that if this injunction is to be supported then in all cases before the purchase-money is paid a railway company or other public body could be prevented from using their compulsory powers for the purpose of ascertaining the value. In my opinion that is not a parallel case. The very object of those proceedings, although they are compulsory, is to ascertain the amount of the purchase-money and to enable that not only to be ascertained but to be paid. Whether the lands are authorized to be taken or used must, in my opinion, depend on whether there is or is not at the time of the attempt on the part of the body to exercise this power any condition precedent against their taking the land which has not been performed, independent of doing that which must always be done before the

C. A. 1882

SPENCER v. METROPOLITAN BOARD OF WORKS.

Cotton, L.J.

purchase is completed, namely, the payment of the purchase-money and those compulsory steps which must necessarily be gone through before the purchase-money can be ascertained. To say that the non-payment of the purchase-money would prevent the company from taking any proceedings towards acquiring the land authorized to be taken, used, and held for the purposes of the Act would of course bring the operations of the company to a deadlock, and we could not possibly adopt that construction.

It was hinted that probably the Board could not completely take away the title of the landowner till the condition had been complied with. If that is so (and I should say that it would not be right to allow them to do so unless they were in a position to use the land or enter into possession) is it right that they should go on and ascertain the purchase-money before the condition is complied with? Consider the consequences of holding them entitled to do so. Are we to say that the purchase is to remain in suspense, and that the Board are not in a position to get a conveyance? The landowner would have the right of obtaining by action payment to him of the purchase-money which has been assessed by a jury or has been found by arbitration. The Board are a public body, spending not their own money, but the money of the ratepayers. Would it be right to put such a construction on the Act that although the title could not be acquired from the landowner they yet should be obliged to pay the purchase-money.

Assuming, then, that this is within the proviso in sect. 33 a taking of the land within the meaning of that section, what ought we to do? In my opinion we ought to prevent the Board from going on to exercise their compulsory powers when they are not in a position at the present moment to say, "If we pay the purchase-money these are lands which we can use." They cannot use these lands at the present moment, for they have to perform a condition precedent. They can only interfere with the rights of the landowner for the purposes of the Act, and in my opinion, although there is an obligation on them at some future time to perform this condition precedent, still as they have not yet performed it we ought at the instance of the landowner (who does not wish to be compelled to go before a jury and

state the price which he requires for his land at the risk of having to pay the costs if he sets too high a value on it) to restrain the Board from going on to exercise their compulsory powers.

I will say one word as to the inconvenience which it is suggested will arise from the construction adopted by Mr. Justice *Chitty*. Power is given in the 33rd section to the Secretary of State to exempt the Board from this condition precedent. Of course it never could be suggested that any Secretary of State would the moment after the passing of the Act, or without good grounds, exercise that power, and, as was said, put an end to the Act of Parliament. But if the Board had acted reasonably in the execution of the powers given to them by the Act, and could shew that they were not able to make the improvements within the limited time by reason of the check imposed by this condition on the exercise of their compulsory powers, I think that Parliament if appealed to would probably give them extended time. But no one, in my opinion, would say that the Secretary of State was acting wrongly if under those circumstances he exercised the power given to him by the Act of Parliament of exempting the Board from this condition precedent, when, if full effect were given to it they would be prevented from executing the improvements. I do not therefore feel pressed by the suggested inconvenience of construing this Act of Parliament in the way I do.

In my opinion, therefore, Mr. Justice *Chitty* was right, and this injunction ought to be maintained.

BOWEN, L.J.:—

It would be impossible to say that this is not a case of very great difficulty, and before delivering my opinion, which is of course to some extent coloured with doubt because of the judgment of the Lord Justice *Cotton*, to say nothing of the judgment of the Court below, I should have desired to take further time to consider if I had not come to a very distinct view upon the point.

The question arises under the *Metropolitan Street Improvements Act*, 1877, by which the Metropolitan Board of Works are entrusted with the power and the duty of making certain street improvements. Towards the end of the Act come two sections, which are

C. A. 1882 SPENCER v. METROPOLITAN BOARD OF WORKS. Bowen, L.J.

introduced for the protection, first, of certain individuals of the working classes, and secondly, of the working classes generally. The Plaintiff had a notice served upon him to treat for more than fifteen of his houses on the 6th of February, 1882, and on the 11th of August, 1882, notice of the intention of the Board to summon a jury was also served upon him. The complaint of the Plaintiff is, that the Board in serving notice of their intention of summoning a jury have done what they are not authorized to do under the latter clause introduced for the benefit of the working classes generally. The provision which the Plaintiff relies upon is as follows:—[His Lordship read the proviso to sect. 33.]

It is admitted that the Board are about to take fifteen houses or more occupied at the time of the passing of the Act either wholly or partially by the labouring classes, and that the consent of the Secretary of State has not been obtained for the taking them, and that as yet the Board have not proved to the satisfaction of the Secretary of State that sufficient accommodation in suitable dwellings has been provided elsewhere.

The Plaintiff insists that the Board in giving notice of their intention to summon a jury have done something which they are not authorized to do, and which the Court will enjoin them from proceeding with. Now in order to make good that position the Plaintiff, it seems to me, must shew one of two things—either that service of the notice of the intention of the Board to summon a jury is a taking of houses within the meaning of this prohibition or proviso in the special Act, and that the Board therefore are actually taking something which they are forbidden to take; or he must shew that the Board are acting outside the powers of the *Lands Clauses Act* and of their special Act, and that in serving notice of their intention to summon a jury they are doing that which is *ultrà vires* and unauthorized.

The Attorney-General argued that the word "take" in sect. 33 meant simply to take possession of. I do not at present accede to that view of the section, but saying that seems to me by no means to get rid of the difficulties of the case. I think it the sounder view that the word "take" in sects. 32 and 33 has an extended meaning, and that it means either take from the landlord that which the landlord has got, viz. his title, or take from

the person who is in possession what he has, viz. possession. I will assume for the purposes of this case that "take" has that extended meaning, and not merely the narrow meaning sought to be put on it by the Attorney-General. The words in this Act no doubt have light reflected upon them by the *Lands Clauses Act*. That Act is incorporated, and although it does not follow from that incorporation that every word in this Act is to be read in the same sense in which it is used in the *Lands Clauses Act*, nevertheless I think that some light (I agree that it is a distant light) may be thrown by the provisions of the *Lands Clauses Act* upon the provisions of this special Act in which it is incorporated.

Now I think it will be found that in the *Lands Clauses Act* the word "take" is used in more than one sense. In the 1st section the word seems to be used in a general sense. That section says that the Act shall apply to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking. In the preambles to sects. 6 and 16 a distinction is drawn between "purchase of lands by agreement" and "the purchase and taking of lands otherwise than by agreement." In sect. 68 the word "taking" occurs, and it is clear from *Burkinshaw* v. *Birmingham and Oxford Junction Railway Company* (1) that in that section "take" means actually take, as distinct from serving a notice to treat or any other kind of constructive taking. Looking at the *Lands Clauses Act* as a whole, and looking at common parlance and at the language of most Acts which give compulsory powers to public bodies, I think we may say that the word "take" ought not to be confined to taking of actual possession. When we turn to the *Metropolitan Street Improvements Act*, 1877, and compare the preamble, in which the use of the word "take" is general, with sect. 5, and especially with sect. 31 where the word "take" is obviously used in the larger sense, I think the safer construction is that "take" means either take from the landlord what the landlord has got, or take from the tenant and occupier what the tenant and occupier has got, viz. possession. When, however, we come to sects. 32 and 33 I think that the difficulty of the case is not surmounted by adopting this larger construction.

(1) 5 Ex. 475.

C. A. 1882 SPENCER v. METROPOLITAN BOARD OF WORKS. Bowen, L.J.

The first question is, whether what the Board have done or are now doing is a taking within the meaning of sect. 33 of the special Act. Is the notice to treat a taking at all; whatever sense be placed on the word taking? Serving a notice to treat certainly is one of the necessary steps towards a compulsory taking, but I cannot see that it is an actual taking. Then is the service of notice of the intention to summon a jury a taking? That again seems to me to be a step under the compulsory powers of the Act, but it does not amount to depriving the landlord of his title. The landlord will be deprived of his title, if at all, at a later stage of the proceedings. Nor is it an acquiring of actual possession. In no sense therefore of the word is this a taking.

Then we come to the second point, which is one of great difficulty. Assuming that the Board are not actually taking, still it is said that they are moving in the direction of a taking, and are putting in force a compulsory power which they are not entitled to exercise, because they are not yet in a position to take. Whether that argument is to prevail or not seems to me to depend entirely on the answer to be given to one short question, whether these are houses which the Board are authorized to take. If so, they may proceed as far as they think fit in the direction of taking, subject only to this, that before actually taking they must comply with the condition. The Board are acting under sect. 18 and the following sections of the *Lands Clauses Act*. Sect. 18 provides that "When the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special Act, or any Act incorporated therewith, they are authorized to purchase or take," they are to serve a notice to treat. After this they are to take other steps, among which is a notice to summon a jury. The short question, then, is, are these houses at this moment lands authorized to be taken? It is said that they are not lands authorized to be taken, because before they are ultimately taken something further has to be done. But it seems to me that although before a title to them can be finally acquired, or possession or entry can be actually effected upon them, something further has to be done, nevertheless they are at this moment lands authorized to be taken by the special Act. The 5th section of that Act is expressed in the most general

terms, and empowers the Board to "enter upon, take, use, and hold and acquire easements over such of the said lands" (that is, lands delineated on the deposited plans and described in the books of reference) "as they may deem necessary for the purposes of the improvements and for providing space for the erection of houses and buildings adjoining and near thereto." The lands to which this action relates are lands delineated on the deposited plans and described in the books of reference. Why, then, are they not lands authorized to be taken? If in the remainder of the Act we could find that there was some exemption or fetter imposed which the Board could not themselves remove, then I should agree that very probably these lands would not be lands authorized to be taken. The Act itself presents salient instances of exception of particular properties from the general power. The portico and steps of *St. Martin's Church* are on the deposited plans, and, I suppose, within the description in the books of reference; yet sect. 6 enacts that nothing in the Act shall authorize the Board to enter upon, take, or use any part of them. Therefore the portico and steps of *St. Martin's Church* are not land authorized to be taken, because although they would otherwise be within the general terms of sect. 5 there is a special exception of them in section 6. Again, in sect. 5 itself, there is an express exception of certain lands shewn on the deposited plans. Then sections 34 and 35 prohibit the taking certain Crown lands, which no doubt are described upon the deposited plans and in the books of reference, without the consent of the Commissioners mentioned in those sections. Therefore there are instances of land which the Board are not authorized to take, although the general section, but for the subsequent provisions, would appear to entitle them to do so.

But when we come to sect. 33 we find that the proviso to that section does not exempt these particular lands from the authority to take, but only says that before they are taken something else is to be done which the Board can do, and which the Board can be compelled to do, because I do not doubt that a mandamus could be obtained against the Board if they failed to fulfil this obligation. It is not therefore the case of the Board not being able to take these lands, because they are not only authorized

C. A. 1882

SPENCER v. METROPOLITAN BOARD OF WORKS.

Bowen, L.J.

to take them but they are authorized to do everything that is necessary to acquire a full title to them. And if these are lands authorized to be taken, all the compulsory machinery of the *Lands Clauses Act* is applicable—subject to the proviso introduced by the 33rd section of the special Act, viz., that before actual taking is effected something further will have to be done.

The illustration has been urged upon us in argument of the case where the capital of a company has not been subscribed. It is said that as the Court would interfere to prevent a company in that case from putting in force its compulsory powers, so here it ought to prevent these lands being taken, because something has not yet been done which must be done before they are taken. The answer is obvious—the section of the *Lands Clauses Act*, 1845, s. 16, that prevents a company from proceeding until the capital is subscribed is a section which says in so many words that no step shall be taken until the capital is subscribed. There are no such words here, for the proviso in sect. 33, as I read it, simply says that the taking shall not be complete or effective until a certain condition has been complied with.

Now, is there anything in this construction to lessen the protection which the Legislature must be supposed to have intended to give to the labouring classes? for I agree that if there were, that would be a very good reason for pausing before adopting that construction. But I can see nothing of that kind. If, indeed, we were to adopt the learned Attorney-General's narrower construction and to say that the Board might do everything down to actually taking possession of the lands in question, I think that the protection which the Legislature may be supposed to have intended to give to the individuals of the labouring classes who are sought to be protected by sect. 32, and the class itself which is protected by sect. 33, would be materially lessened, for they would lose at all events the barrier of the landlord's title. But adopting the construction which I put on the proviso, and giving the wider meaning to the word "take," it seems to me that the labouring classes have as full protection under these two sections as it can be contended that they ought to have. They have the landlord's title so long as the landlord chooses to enforce it. If

the landlord ceases to wish to enforce it they have a right at all events to protect their own possession, and get it protected, if necessary, by the Secretary of State or the Attorney-General.

It has been said that the Board, if this construction be adopted, might go on to the very last and then be placed in embarrassment, because they would have served their notices and had the cases tried and the amount of compensation decided by a jury, and then find themselves unable to complete. It seems to me that it would be the fair construction of this Act to hold that the Board have the time down to the very perfecting of their title given them for obtaining the consent of the Secretary of State. I cannot think that a public body like the Metropolitan Board of Works ought to be assumed to be likely to place themselves in pecuniary embarrassment so as to be unable to complete their works.

For these reasons I think that the injunction ought to be dissolved.

Solicitor for Plaintiff: *R. H. Veal.*
Solicitor for Metropolitan Board of Works: *R. Ward.*

H. C. J.

FRANCIS *v.* HAYWARD.

[1881 F. 108.]

Easement—Right to use Fascia—Adjoining Tenement—Common Landlord.

The Plaintiff was lessee of a house numbered 152 in *A. Street*, but which lay behind Nos. 151 and 153 in that street, and at the bottom of a court approached by a passage from *A. Street*, half of which passage was under the first floor of No. 151, and the other half under the first floor of No. 153. The passage was closed by a gate in the plane of the front of 151 and 153, which was hung on the wall of 153, but was admitted to be part of the Plaintiff's premises. All three houses belonged to the same landlord. Above the gate was a fascia of cement eight feet long, half of which was on the wall of 151, and the other half on that of 153. The fascia had existed from about 1845, and the number of the Plaintiff's house and the name and business of the occupier for the time being had always been painted on it. No. 153 was demised to the Defendant in 1874 without

C. A.
1882
FRANCIS
v.
HAYWARD.

any express reservation of the fascia, and the Plaintiff became lessee of No. 152 in 1876 :—

Held (affirming the decision of *Kay*, J.), that the fascia must be held to be a parcel of the property demised to the Plaintiff, and that he was entitled to prevent the Defendant from interfering with it.

THE Plaintiff was the lessee of No. 152 *Aldersgate Street*, which formerly was numbered 132. This house lay behind Nos. 151 and 153 *Aldersgate Street*, at the bottom of a court, which communicated with the street by a passage under the first floors of Nos. 151 and 153. These two latter houses were on the west side of and fronted to the street, and the fronts of their upper stories adjoined each other. Half of the passage was under the first floor of 151, and the other half under the first floor of 153. All three houses belonged to the same lessor. The Defendant was the lessee of 153. The passage was closed by a gate which was hung from the Defendant's wall, and was in the same plane with the fronts of 151 and 153. The Defendant at first disputed the Plaintiff's title to this gate, but subsequently, by amendment of his defence admitted that it formed part of the Plaintiff's premises. Above the gate was a fascia, eight feet long by two feet six inches in depth, formed of cement plastered as to one half on the brickwork of 151 and as to the other half on that of 153. This fascia had existed from about 1845, and in 1855 the number of the house now occupied by the Plaintiff, with the name and trade of the occupier, were painted on it, and subsequently the names and trades of the occupiers for the time being were painted on it.

In 1855 the landlord demised No. 152 to certain persons for twenty-one years, "together with all ways, waters, watercourses, lights, easements, privileges, advantages, and appurtenances whatsoever to the said messuage or tenement and premises hereby demised belonging or in any wise appertaining." The residue of the term subsequently became vested in the Plaintiff by assignment.

On the 5th of August, 1874, the landlord let No. 153 to the Defendant by the description of "all that messuage and public-house situate, lying, and being on the west side of *Aldersgate Street*, called or known by the name or sign of the *Coach and Horses*, and also all the yards, outhouses, stables, and appurtenances thereunto belonging, together with all cellars, vaults,

areas, ways, paths, passages, lights, easements, waters, watercourses, commodities, and appurtenances whatsoever to the said messuage or tenement and premises belonging or in anywise appertaining or with the same or any part thereof now or heretofore lawfully or usually used, holden, occupied, or enjoyed, as the same premises are now in the occupation of the said *J. P. Hayward.*"

On the 30th of September, 1876, on the expiration of the lease under which the Plaintiff held, the landlord granted to him a new lease of the property by the description of "All that messuage or tenement, yards, buildings, and premises situate and being on the west side of *Aldersgate Street*, in the parish of *St. Botolph, Aldersgate*, in the said city of *London*, and known as No. 132 in the said street, as the same are now or were lately in the occupation of *F. Bull*, which said premises are bounded on the north by premises in the occupation of Mr. *Blake*, on the south by premises in the occupation of Mrs. *Smith* and Messrs. *J. & P. Arnold*, on the east by premises in the occupation of Mrs. *Robertson*, Messrs. *Marben & Bingham*, *Aldersgate Street*, and the *Coach and Horses* tavern, and on the west by premises in the occupation of Messrs. *Collingridge* and *Arnold*. Together with all ways, waters, watercourses, lights, easements, profits, privileges, and advantages, and appurtenances whatsoever to the said messuage or tenement and premises hereby demised belonging or in anywise appertaining."

On the 12th of January, 1878, the landlord granted to the Defendant a fresh lease of No. 153 by the same description as in the lease of 1874.

The Defendant in 1880 proceeded to make alterations in No. 153 according to plans by which, if carried into effect, that half of the fascia which was upon his house would be covered up. This action was commenced to restrain him from so doing, and to recover damages. Mr. Justice *Kay* ordered the Defendant to restore the fascia at his own expense and pay the costs of the action (1). The Defendant appealed.

Rigby, Q.C., and *Onslow*, for the appeal:—

A right of this kind cannot pass by the general words in the

(1) 20 Ch. D. 773.

C. A. 1882 FRANCIS v. HAYWARD.

Plaintiff's lease, for in order to pass as appurtenant the thing must have a legal existence. Now there can be no easement by user as between landlord and tenant: *Gayford* v. *Moffatt* (1); *Brett* v. *Clowser* (2); *Polden* v. *Bastard* (3).

[JESSEL, M.R.:—Could not a detached signboard pass as part of a house?]

A detached signboard might be considered part of the house, but this is rather the case of a signboard fixed on another house. Half of the fascia is attached to and forms part of our house, and it was not excepted from the property demised to us; the landlord, therefore, could not in 1876, after the lease to us, grant it to the Plaintiff. Moreover, the description of boundaries in the Plaintiff's lease excludes this fascia, for it is beyond the boundaries. The words "as the same are now in the occupation of *A. B.*" only define the boundaries, and do not affect easements: *Martyr* v. *Lawrence* (4). *Watts* v. *Kelson* (5) does not support the Plaintiff's case, for there the grant contained words clearly sufficient to pass such an easement as the one there in question.

Higgins, Q.C., and *Warmington*, *contrà*, were not called upon.

JESSEL, M.R.:—

I have no doubt that Mr. Justice *Kay* was right in holding that this fascia was a part of the premises demised to the Plaintiff. The question is one of fact, not of law—parcel or no parcel. It is quite possible that something imbedded in one house may be a parcel of another house, though quite separate from it, and we have to infer from the facts proved whether the fascia was not a parcel of the Plaintiff's house. From about 1845 the fascia has been where it now is, and has been used for the purpose of having painted on it the number of the Plaintiff's house and the name and occupation of the occupier for the time being. That house lies back from the street, and is approached by a gateway. The gate is in *Aldersgate Street*, and the fascia is in the same plane with the gate. In a sense the gate is in the

(1) Law Rep. 4 Ch. 133.
(2) 5 C. P. D. 376.
(3) Law Rep. 1 Q. B. 156.
(4) 2 D. J. & S. 261.
(5) Law Rep. 6 Ch. 166.

Defendant's house, for it is hung upon his wall. Does it then belong to him? As to that we have an admission in the pleadings. It is remarkable that at first the Defendant did not admit that the gate belonged to the Plaintiff, but by an amendment of his pleadings he admitted that it did. Whether the Plaintiff has any interest in the archway beyond a right of passage does not appear. Why should not the fascia belong to the owner of the gate? It is not correct to say that there is no connection between them—the fascia is in the same plane with the gate and immediately above it. I should say that *primâ facie* a plate bearing the number of a house and the name of the occupier is part of the house, so when I find over a gate the number of the house to which the gate leads and the name of the occupier, I should expect the plate on which they are inscribed to belong to the owner of the gate.

Up to 1876 it is clear that the fascia was used for the purpose I have mentioned. The Defendant took his house in 1874. Did the landlord demise to him this fascia which was then in existence? If it was part of the Plaintiff's house he did not, for he only demised the public-house, as it was then in the occupation of the Defendant.

It is said, however, that this fascia was not included in the lease of 1876 to the Plaintiff, and this is the only argument on the part of the Defendant that appeared to me to have any weight. The lease is not very artistically drawn. The house is described as situate on the west side of *Aldersgate Street*, and known as No. 132 in that street. Now it does not adjoin the west side of the street unless the gate and fascia are taken as part of the house, and so far they ought to be held included. Then it is described as bounded on the east by (*inter alia*) the Defendant's property. But this general description of the boundaries does not cut down the effect of the prior description. When after a description of a property it is stated that on one side it is bounded by a certain other property, and it appears that it is not so bounded for every inch, there is an inaccuracy in the statement of the boundary, but this is not enough to exclude what is not so bounded if it appears from the evidence to have been part of the property dealt with, and the previous description

C. A. 1882 FRANCIS v. HAYWARD.

of that property is sufficient to include it. The Lord Justice *Cotton* left the Court so shortly before the conclusion of the argument for the Appellants that I think we may treat him as being present, and as adhering to the conclusion which he expressed to me on leaving the Court that the decision of the Court below ought to be affirmed.

BOWEN, L.J.:—

I add only this—that though we decide this case solely on the ground of parcel or no parcel, I am disposed to think that if the case were to be treated as a question of easement the lessee of No. 153 ought to be considered as taking subject to the easement.

Solicitors: *M. Webb & Son; A. G. Ditton.*

H. C. J.

C. A. 1882 V.-C. B. *June* 17. C. A. *Nov.* 10.

PEARETH *v.* MARRIOTT.

[1856 P. 25.]

Will—Legacy—Annuity—Income Tax—Payment to be made "clear" and without "Deduction for the legacy tax, or any other matter, cause, or thing whatever"—Annuity held free of Income Tax—Res Judicata—Order directing Payment without declaring Rights—"Until further Order"—Leave to appeal.

Post 270, 1

Testator directed trustees to stand possessed of residuary real and personal estate upon trust to pay thereout to his wife, during her life, such an annual sum as, together with the income of a settled fund of £10,000, should produce to her "a clear annual income of £1500." He gave several legacies and annuities, and towards the end of his will declared that "no deduction shall be made from any of the legacies given by this my will, or to be given by any codicil thereto, for the legacy tax or any other matter, cause, or thing whatever."

An administration suit having been brought, an order was made in 1861 that the trustees of the will should repay to the widow certain sums which had been deducted from her annuity by mistake for succession duty, and that they should pay her until further order an annuity of £1500 free of all deductions except income tax; but no express declaration of her rights was made. This order was acted upon until 1882, when a petition was presented by the widow asking that the income tax which had been

deducted might be paid to her, and that in future her annuity might be paid free of income tax :—

Held, by *Bacon*, V.C., that the widow was entitled to receive from the trustees a clear annuity of £1500, without any deduction therefrom on account of income tax :

But *held*, by the Court of Appeal, that the order of 1861 amounted to a declaration of the right of the widow to receive the annuity free of all deductions except income tax, notwithstanding the words "until further order," and that the matter was *res judicata* and could not now be reconsidered :

Held, also, that considering the lapse of time leave ought not to be given to appeal from the order.

The order of *Bacon*, V.C., was accordingly reversed.

Quære, whether, if the matter had not been *res judicata*, the decision of the Vice-Chancellor was correct.

WILLIAM PEARETH, by his will, dated the 17th of June, 1852, after devising hereditaments in strict settlement, gave to his trustees a legacy of £13,500 to be held upon certain trusts. He then gave several legacies, and eight annuities of various amounts. He then directed his trustees to stand possessed of his residuary real and personal estate, as a mixed fund, upon trust to pay thereout to his wife *Katherine Peareth*, during her life, "such an annual sum of money as together with the dividends and annual produce of the sum of £10,000," to which his said wife would, in case she should survive him, become entitled by virtue of her and his marriage settlement, "shall produce to her a clear annual income of £1500," to be payable half-yearly ; and he declared that the provision thereby made for his wife should be in lieu and satisfaction of all dower or thirds at Common Law or by custom or otherwise. In a subsequent part of the will, after giving further legacies, the testator declared that "no deduction shall be made from any of the legacies given by this my will, or to be given by any codicil thereto, for the legacy tax, or any other matter, cause, or thing, whatsoever."

By a codicil dated the 27th of December, 1852, testator reduced the legacy of £13,500 to £9490.

Testator died on the 19th of September, 1854, and his will was proved on the 6th of December following.

The original suit was instituted in February, 1856, for administration ; a decree was made on the 12th of January, 1857, by

C. A. 1882 PEARETH v. MARRIOTT.

Vice-Chancellor Sir *W. P. Wood*, and several orders had been made since. Among others, by an order made at Chambers on the 12th of July, 1861, on the application of the widow, it was ordered that the Defendants, the trustees, should be at liberty to pay to the applicant out of the personal estate of the testator the sum of £71 5*s.* 10*d.*, paid by her for succession duty in respect of her annuity, accrued due since the death of the testator on the sum of consols therein mentioned, by which amount the annuity of £1500 by the decree directed to be made up to the applicant had been reduced; and it was ordered that the Defendants, the trustees, should pay to the applicant, by half-yearly payments on the 19th of March and the 19th of September in each year, until further order, such an annual sum as with the dividends of a sum of stock standing in Court, and representing the £10,000 above-mentioned, would make up the annual sum of £1500, "free of all deductions except income tax," the first of such payments to be made on the 19th of September, 1861.

On the 8th of May, 1862, a supplemental suit was instituted, and by a decree in that suit dated the 12th of July, 1862, the decree of the 12th of January, 1857, was ordered to be carried into execution.

By an indenture dated the 9th of December, 1862, a receiver was appointed of the annual income payable to *Katherine Peareth.*

On the 10th of December, 1862, *Katherine Peareth* married the Rev. *William Bulmer.*

By an order made in the causes on the 3rd of February, 1866, it was, amongst other things, ordered that out of the future interest accruing due on a particular fund standing in Court the sum of £1129 0*s.* 4*d.*, being such an annual sum as with the interest on the fund representing the £10,000 referred to in the order of the 12th of July, 1861, would make up the annual sum of £1500, "free of all deductions except income tax," should be paid to the receiver, during the life of Mrs. *Bulmer*, or the further order of the Court, by half-yearly payments.

This petition was presented in June, 1882, by Mrs. *Bulmer*, her husband, and the receiver, stating that under the circumstances aforesaid the first-named Petitioner had, since the death of the

testator, received out of his estates such sums as made up the annual income of £1500, but not such sums as would have made the clear annual income of £1500, as in fact such income had been throughout the whole period reduced by the income-tax as well upon the dividends of the funds representing the £10,000 under the marriage settlement as upon the dividends payable out of the testator's own estate; the amount of such income-tax having been deducted before the dividends were paid to the first-named Petitioner, and that the amount of the income-tax so deducted up to and including the half-yearly annuity due on the 19th of March, 1882, was £1081 5*s*.

The petition prayed that the sum of £1081 5*s*. might be raised and paid to the receiver, and (in substance) that the future half-yearly payments to the receiver might be of the annuity of £1500, clear of income-tax.

The petition was heard before Vice-Chancellor *Bacon* on the 17th of June, 1882.

Hemming, Q.C., and *Maidlow*, for the Petitioner, Mrs. *Bulmer*:—

The question is, whether the annuitant is entitled to have future payments of the annuity made to her clear of income tax; and whether, in consequence, she is also entitled to have repaid to her the deductions that have been made from time to time in respect of income-tax.

The orders of the Court do not conclude the Petitioner; those orders were only until further order. They were made, moreover, without discussion or argument, and before the decision of Vice-Chancellor *Hall* in *In re Bannerman's Estate* (1). In that judgment the learned Vice-Chancellor shews how the opinion that originally prevailed was corrected by Vice-Chancellor *Kindersley* in *Lord Lovat* v. *Duchess of Leeds* (2). In the last-named case the language was that the trustees were "to pay and defray all taxes, parliamentary, parochial, or otherwise," affecting the hereditaments given to the wife, words which are not so strong as those in *In re Bannerman's Estate*, or in the present case, but Vice-Chancellor *Hall* thought nevertheless that the principle applied.

In sect. 40 of the *Income Tax Act*, 1853 (16 & 17 Vict. c. 34)

(1) 21 Ch. D. 105.

(2) 2 Dr. & Sm. 62.

C. A. 1882 PEARETH v. MARRIOTT.

the amount of rate of duty is spoken of as "a deduction," and the direction in the will expressly is that "no deduction shall be made" from any of the legacies. That the word "legacies" includes an annuity is too clear for argument.

Brodrick, for the surviving trustee.

Millar, Q.C., and *Knox*, for the residuary legatees:—

The question is *res judicata*, and is concluded by the order of the 12th of July, 1861. But if not, there is no new law in *In re Bannerman's Estate* (1), nor is that decision at variance with the current of authority, for in the words of that will Vice-Chancellor *Hall* found what he considered equivalent to an express direction that the annuity should be paid free of income tax. Accordingly we claim the case as an authority in our favour.

In the 4th edition of Jarman on Wills (2) the learned editor observes: "Property tax is a charge on the person, and therefore a gift of an annuity to be paid without any deduction (*Abadam* v. *Abadam* (3)) or free from legacy duty and other deductions (*Lethbridge* v. *Thurlow* (4); *Sadler* v. *Rickards* (5)), does not exempt from the tax, unless the testator has elsewhere shown that he considers income tax to be a 'deduction': *Turner* v. *Mullineux*" (6). That observation is founded on *Abadam* v. *Abadam*, which is on all fours with the present. A testator gave an annuity to his widow for life, "to be payable without any deduction whatever." The Master of the Rolls (Lord *Romilly*) said that the authorities all came back to this—What was the intention of the testator? was it directed against the income-tax? and did he consider it in the nature of a deduction from the legacy? and the Court held that the annuity was not given free of income tax. Here the testator has not spoken of income tax, and by directing that no deduction shall be made "from any legacy," shews that he was not thinking of income tax, since income tax is inapplicable to a legacy. In *Wall* v. *Wall* (7), decided by Sir *L. Shadwell*, V.C.E., in 1847, an annuity was given "clear of

(1) 21 Ch. D. 105.
(2) Page 187, n.
(3) 33 Beav. 475.
(4) 15 Beav. 339.
(5) 4 K. & J. 302.
(6) 1 J. & H. 334.
(7) 15 Sim. 513.

all taxes and deductions." In *Lethbridge* v. *Thurlow* (1), before Sir *J. Romilly*, M.R., in 1851, the gift of the annuity was "clear of legacy duty and every other deduction whatever." In both these cases it was held that the annuity was not to be taken free of income or property tax. In *Turner* v. *Mullineux* (2), on the other hand, before Lord *Hatherley*, then Vice-Chancellor *Wood*, "income or property tax" was expressly mentioned in a clause of the will, and the Court held that the subsequent phrases, "free from all deductions" and "free from deductions," related back to and were explained by the former.

The circumstances that in the present case the testator's mind was directed to the exclusion of one tax only, namely, the legacy duty, which is a tax upon property and not upon the person, and that the direction is not attached to the gift of the annuity, which is only to be found a long way off in a subsequent part of the will, are distinguishing features in this case.

In *Sadler* v. *Rickards* (3), before Lord *Hatherley* (V.-C. *Wood*), in 1858, the words were "free from legacy duty and other deductions;" and Mr. *Beales*, for the annuitant, attempted to draw a distinction between the Acts of 1842 and 1853. He further contended that, as the only deduction other than legacy duty was income tax, it must have been aimed at by the testator, but the Vice-Chancellor said he could not draw any distinction between the Acts, and that income tax must be paid by the annuitant.

Hemming, in reply:—

It is no longer the law, as laid down in *Lethbridge* v. *Thurlow* and *Turner* v. *Mullineux*, that "income tax is not a deduction." We are not, in this case, in direct conflict with *Lethbridge* v. *Thurlow*. That was the case of a rent-charge, and if the property tax had not been paid by the rent-charger it must have come out of the personal estate.

BACON, V.C.:—

There is, no doubt, a great deal to be said on both sides of this question, and the case is not without difficulty, especially having

(1) 15 Beav. 339. (2) 1 J. & H. 334.
(3) 4 K. & J. 302.

C. A. 1882 PEARETH v. MARRIOTT. V.-C. B.

regard to the various decisions that have been referred to, in which, certainly not without pointed argument, and the direct attention of the Court to the particular topic, it has been held that an annuitant is bound to pay, without deduction, the income tax which is leviable upon his annuity. But in all these cases the Court has only to consider the construction of the will. In some of the cases, such, for instance, as that of *Lord Lovat* v. *Duchess of Leeds* (1), there was no difficulty. The Court considered the will, and said that the legatee was entitled to have the legacy or annuity clear. Of course the Court had no power to say that the Government should not receive its due in the shape of income tax; the tax was payable; by whom it was to be borne was the question.

Now I am driven back to consider the construction of this will. In construing the will one must put oneself in the position of the testator. The testator must be taken to have known, what all the world knows, that by authority of Parliament various taxes are levied on persons liable to pay them. In the case of income tax the Legislature has provided not only that there shall be a personal levy and demand against the person liable to pay, but that the fund out of which it is payable shall be chargeable in the hands of any trustee with the payment of the duty, and that the trustee is bound, before he parts with the income and executes the trusts of the will, to provide for that fiscal demand which the statute has enabled the Legislature to require. I cannot impute to the testator anything but full knowledge of that general fact. Then, providing for his widow, he says that she shall have an annuity of £1500. That would not exempt her from the liability of paying the income tax. Anybody who is in receipt of an income is liable to pay upon that income the duty if properly levied. Any person who has to pay the income (and the Legislature takes this sort of collateral security for the payment), is bound, before he pays, to make a deduction consistent with the law on the subject. If it stood only on the gift of a clear annuity of £1500, I should have no doubt that the annuitant is bound to bear this burden. The testator, in express terms, directs that "no deduction shall be made from any of the legacies given by

(1) 2 Dr. & Sm. 62.

this my will, or to be given by any codicil thereto for the legacy tax or any other matter, cause, or thing whatsoever." What is the meaning of those words in the mouth of the testator? He says to his executors and trustees, "Take all my property, distribute it in the manner I direct; you must give a clear annuity of £1500 to my wife, but in order to do that you must obey the law. The statute has required you to pay the income tax as between you and the state; you have no choice; you must pay it; but when you come to give the clear annuity of £1500, you shall pay it to the legatee without any deduction in respect of tax or any other matter or thing whatsoever." In that way I read this will, and if that be the true construction how can any decision of any Court affect it? If what I have imputed to the testator is what he must be supposed to have meant or said, no decision can countervail that. The executor is to hand over the £1500, neither more or less, without deduction. He has nothing to do with the source from which the authority to demand the deduction comes. The deduction is a duty owing to the State under the statute. The testator says in effect, "You must pay all the money due to the State, but when you come to pay the legatees you must pay them without deducting any of those moneys you have paid to the State. That is perfectly rational, and does not interfere with public policy nor conflict with any established rule. In my opinion, upon the construction of this will, on which alone I found my judgment, the testator has directed his executors to pay the income tax upon £1500, and having done so, to pay the £1500 without any deduction to the legatee.

I ought to have observed that Mr. *Millar* said there had been an order by which the payment was directed to be made until further order subject to the income tax. But I cannot think that has any effect on this case. That was made in the course of the ordinary practice of the Court, and it could not have amounted to a decision in any kind of way.

Millar, Q.C.:—

There is another point, namely this,—such a sum is given by the will as will make up the income of the settlement fund to £1500 a year. Does your Lordship hold that the fund in Court

C. A. 1882 PEARETH v. MARRIOTT.

which represents the settlement fund must repay the income tax deducted from that part of the income which was derived from the settlement fund?

BACON, V.C.:—

I think not. The only thing given by the will is that which the testator had to give. That which came from the settlement he did not give.

J. B. D.

C. A.

From this decision the residuary legatees appealed. The appeal was heard on the 10th of November, 1882.

Millar, Q.C., and *Knox*, for the Appellants:—

It is not really competent to the Court to reopen the question of the construction of the will; for the point was decided by Vice-Chancellor *Wood* when he made the order of the 12th of July, 1861, by which the trustees were directed to pay the annuity to Mrs. *Bulmer* "free of all deductions except income tax." This order has never been appealed from but has been acted upon ever since, and has been confirmed by subsequent orders to the same effect. The matter is therefore *res judicata*.

[JESSEL, M.R., mentioned *Curtis* v. *Sheffield* (1).]

Hemming, Q.C., and *Maidlow*, for Mrs. *Bulmer*:—

The order of July, 1861, contained no express declaration of the rights of the parties, and was not intended to decide them. It is only by inference that the opinion of the Court appears to be inconsistent with our claim. But an adverse opinion, even if established, is not *res judicata* unless it is embodied in the order. It does not appear that the question was even argued. There is no declaration of the rights of the parties in the order. In this it differs from the order in *Curtis* v. *Sheffield*. It was, moreover, only a temporary direction "until further order;" those words shew that it was not intended finally to decide any question between the parties: *Gisborne* v. *Gisborne* (2).

(1) 21 Ch. D. 1. (2) 2 App. Cas. 300.

If the previous order is binding on us we ought to have leave to appeal against it. The Court has constantly permitted this after a considerable lapse of time, where there has been a mistake either of law or fact.

Davey, Q.C., and *Bush*, for the *Law Insurance Society*, who were incumbrancers on a share in the fund set aside to answer the annuity.

Brodrick, for the surviving trustee.

JESSEL, M.R.:—

My difficulty in this case is in following the argument of the Respondent. What is the meaning of *res judicata?* It is a decree *inter partes* on the same subject. What are the facts here? An annuitant claimed payment from the executors, and sought to enforce her claim by an administration suit. This proceeded in the usual way. First, came the preliminary decree directing the Defendants to account and to provide for the annuitant such a sum as would make up £1500 a year. The trustees deducted income-tax and also succession duty from the payments to the annuitant. Then the matter came before the Court in July, 1861, and on that occasion the question what deductions ought to be made from the annuity must have come directly before the Court. The Court decided in her favour as to the succession duty, and directed that the trustees should pay to her out of the personal estate of the testator £71 5*s.* 10*d.* paid by her for succession duty, and then went on to order that the trustees should pay to her by half-yearly payments until the further order of the Court, such an annual sum as with the dividends of a certain sum of consols would make up £1500 free of all deductions except income-tax—almost following the words of the will, and shewing that the payment was intended to be made under the trusts of the will. It is clear that it was meant to be a declaration of rights. It was a decision between the parties as to the proper amount to be paid to the annuitant. One point was decided in her favour, the other against her. If the decision was wrong it ought to have been appealed against at the time. It is not now appealable without the leave of the Court.

C. A. 1882 PEARETH v. MARRIOTT. Jessel, M.R.

Ought that leave to be now given? I think it ought not. The order was made on the 12th of July, 1861. Whether it was argued then, or not, it is not necessary to inquire. The question of the amount to be deducted from the annuity was distinctly before the Court. The order has been acted upon ever since, and some of the shares in the residue have been incumbered. Fresh parties have become interested in the question, who have relied upon the order of the Court.

It is said that the order was only made "till the further order of the Court." There was a further order on the 3rd of February, 1866, when it was ordered that so much as would make up the annual sum of £1500 "free of all deductions except income-tax," should be paid to the receiver during the life of Mrs. *Bulmer*, or till the further order of the Court, by equal half-yearly payments. That shews the meaning of the direction. The sum was ascertained and the income-tax was to be deducted as before, but the mode in which it was payable might be changed.

It appears to me a plain case of decision on the rights of the parties, and, considering the date of the order, I think it would be wrong to interfere with it. The order of the Vice-Chancellor must therefore be discharged.

I may add for the comfort of the Respondent, that, subject to anything which might have been addressed to us in support of the decision of the Vice-Chancellor, I think the order made in 1861 was perfectly right.

COTTON, L.J.:—

The question we have now to consider is, whether the point raised by this petition has been already adjudicated upon; and I am of opinion that the order of the 12th of July, 1861, was a clear decision upon the rights of the parties on this point. It is true that the order does not contain any express declaration that the widow was not entitled to have the annuity free of income tax, but it clearly shews that it was the opinion of the Court that such was the case. The payments which had been made to her had been diminished by deducting succession duty as well as income tax, and the order provided for the repayment of the succession duty, but not for the repayment of the income-

tax, and directed that in future the annuity should be paid to her free of all deductions except income-tax. That amounted to a declaration of her rights, both as to the succession duty and the income-tax.

It is said that the direction for payment was only till further order, but it appears to me that the order was only temporary as to the mode in which the payment was to be made and the funds out of which it was to come. It was final as to the rights of the parties.

I do not dissent from the opinion expressed by the Master of the Rolls that the order of July, 1861, was right, though I do not like to express an opinion without hearing argument. I only say this for the satisfaction of the parties.

Solicitors: *A. F. & R. W. Tweedie; Park Nelson, Morgan, & Gemmell; Bell, Brodrick, & Co.; G. Burges.*

M. W.

V.-C. B.
1882
Nov. 15.

MULLENS *v.* MILLER.

[1882 M. 52.]

Vendor and Purchaser—Misrepresentation by Vendor's Agent—Specific Performance refused.

An agent, commissioned by a vendor to find a purchaser, has authority to describe the property, and to state any fact or circumstance which may affect the value, so as to bind the vendor; and if an agent so commissioned, makes a false statement as to the description or value (though not instructed so to do), which the purchaser is led to believe, and upon which he relies, the vendor cannot recover in an action for specific performance.

A surveyor was employed by the owner of a leasehold house to find a purchaser. He represented to the Defendant that another person, *H.*, was ready to buy the property for £700, and that if the Defendant were to give £50 more, he would make a clear profit of 7 per cent.; that *H.* had further offered to rent the property at £300, or the ground floor only at £200. The Defendant, relying on the above representations and others, which were unauthorized by the vendor, and untrue, contracted to purchase for £750; but afterwards, finding out the falsehood, refused to complete.

The vendor himself also made a misleading statement to the purchaser:—

Held (independently of the statement made by the vendor himself), that the false statements made by the agent, being within his authority, were sufficient to vitiate the contract; and specific performance refused.

THE Plaintiffs, *Samuel Mullens* and *Walter Henry Bosanquet*, being entitled to a leasehold warehouse and hereditaments at No. 3, *Nicoll's Buildings, Golden Lane*, in the county of *Middlesex*, under a lease dated the 1st of June, 1874, for the residue of a term of eighty-four years from Lady Day 1873, at a yearly rent of £240, were desirous of selling the same, and employed *John March Dean* as their agent to find a purchaser. The terms on which *Dean* was employed, as disclosed by the evidence, differed at different times. In October, 1881, and prior to the 13th of December, 1881, they were, that *Dean* was to have half of whatever he might get over £500; on that day he was told he might have the whole of whatever he got over £500.

The Defendant *James Charles Miller* was a personal friend of *Dean's*, and was at *Dean's* house on the evening of the 11th of December, 1881. *Dean* told him of the property which was for

sale, said it was a great bargain, and then, or on the day after the following day, was alleged to have made a number of representations which, as stated in the defence, were as follows:— (1.) That the last tenant of the said premises had rented it at £350 a-year and had only left owing to litigation between the Plaintiffs and third parties; (2.) That Messrs. *Hemming & Co.*, of 47, *Moorgate Street*, in the city of *London*, corrugated zinc roofing manufacturers, had offered to rent the said premises from the Plaintiffs at £300 a-year, but had been refused by the Plaintiffs; (3.) That the said Messrs. *Hemming & Co.* had offered to buy the said premises from the Plaintiffs at the price of £700; (4.) That the said Messrs. *Hemming & Co.* were prepared to take the ground floor of the said premises on lease at £200 a-year; (5.) That another party was prepared to take the top floor at £100 a-year; (6.) That a loan of £1500 had easily been obtained on mortgage of the said premises; (7.) That the said premises had been valued and found good security for the last-mentioned amount; and (8.) That a sum of £2000 had been advanced on mortgage of the said premises.

On the 13th of December, 1881, the Defendant met *Dean*, and went with him to look over the premises. They then went together to the Plaintiff *Bosanquet's* office, where *Dean* first saw *Bosanquet* alone and the above arrangement as to *Dean's* commission was made. *Bosanquet* then drew up and read over to the Defendant an agreement dated of that day, and made between *Bosanquet* on behalf of himself and the co-Plaintiff of the one part, and the Defendant of the other part, whereby the vendors agreed to sell, and the purchaser agreed to purchase, the property for £750, for all the term except the last few days thereof, subject to a good title being deduced; the purchase to be completed on the 24th of December following. The Defendant took the draft agreement to his solicitor, who approved it. Defendant then went back to *Bosanquet's* office, where he signed the agreement, and paid a deposit of £50.

Part of the case turned upon what took place at *Bosanquet's* office. The Defendant said that after the draft had been written out, and before it was signed, *Dean* said to *Bosanquet* across the table, "Is it not true that £1500 was recently lent on mortgage

V.-C. B. 1882 MULLENS v. MILLER.

of the property?" and that *Bosanquet* said, "No, the amount lent was £2000." *Bosanquet's* statement was that he said "yes," and added, "but at that time the warehouse was let;" and he believed he added that the mortgage comprised a second charge on the adjoining warehouse.

Before going to *Bosanquet's* office on the 13th, the Defendant had asked to see *Hemming*, and was told he was out of town. On the 16th of December *Dean* wrote to the Defendant to say he had an appointment "with *Hemming's* representative" on Monday (19th), "but," he added, "it is not likely, when they and others were negotiating for the entirety at £300, and you jump over their heads, and purchase at £750, that an increased rental could be obtained from them." In another letter *Dean* spoke of "*Hemming's* man," and of others, with whom he represented himself to be in negotiation, and on the 20th of December, 1881, the Defendant wrote to *Dean* to say that if by Friday next (23rd) he failed to substantiate his statements about the proposed tenants for the ground floor and the top floor of No. 3, *Nicoll's Buildings*, he should consider himself at liberty to cancel the contract.

The Defendant ultimately refused to complete, and on the 3rd of January, 1882, the writ was issued for specific performance.

The statement of claim, delivered on the 18th of January, 1882, said that the Defendant alleged fraud and misrepresentation on the part of the Plaintiffs, and denied the charges.

The statement of defence (6th of February, 1882) set forth the above statements and representations, and stated that the first seven were made by *Dean*, and the last by *Dean* and the Plaintiffs. The Defendant also counter-claimed repayment of the deposit.

In reply (27th of February, 1882), Plaintiffs said that statement No. 8 was true, and was made to the Defendant by the Plaintiff *Bosanquet*, but not till the Defendant had finally agreed to purchase. They stated also that *Dean* was not the agent of the Plaintiffs for sale; that he was merely employed to find a purchaser; that he had no authority to contract or negotiate, or to make any statement or representation, except that the Plaintiffs were desirous of selling.

The results of the evidence are given in the statement above, and in the judgment. Mr. *Hemming*, of *Moorgate Street*, denied

that he had ever been in treaty either for the purchase of the property or for the lease of any part of it; and on being confronted with *Dean* in Court, said he had never heard of or seen him before to his knowledge. He further said that no one had been in his office, except a young man, a clerk, whose name he did not know, who kept the books, but did not negotiate anything. *Dean's* suggestion was that the young man, whose name was stated to be *Olrich*, was *Hemming's* "representative." He was not called.

The facts as to the mortgage of the property were, that on the 27th of March, 1876, Plaintiffs obtained from a Mr. *Henry Harrison* a loan of £2000 on the premises, ostensibly for a Mr. *Robson*, who was then the alleged owner; but the mortgage comprised other property—namely, the equity of redemption of the adjoining premises, No. 2, *Nicoll's Buildings*, subject to a prior mortgage thereon for £1600. This mortgage transaction led to a suit which was compromised; and in the result the premises were re-conveyed by *Harrison* to the Plaintiffs by a deed dated the 18th of December, 1878, for the expressed consideration of £120; but the Plaintiff *Bosanquet* admitted in cross-examination that the property had cost the firm £3000; and that he had paid *Harrison* £2320.

Millar, Q.C., and *Dauney*, for the Plaintiffs:—

The question of whether the Plaintiffs are liable for the representations made by *Dean*, depends upon the question of law, whether the right to make such representations was comprised within the authority given to *Dean*: *Chapleo* v. *Brunswick Permanent Building Society* (1); *Eaglesfield* v. *Marquis of Londonderry* (2). We contend that the instruction given to *Dean*, which was only an authority to find a purchaser if he could, did not empower *Dean* to make on behalf of the Plaintiffs the statements he is alleged to have made; and that the Plaintiffs are not bound by such statements.

The Court called upon

Marten, Q.C., and *Ingham*, for the Defendant:—

These representations were statements made by an agent in the

(1) 6 Q. B. D. 696. (2) 4 Ch. D. 693.

V.-C. B. 1882 MULLENS v. MILLER.

course of his business. If so, they are binding on the principal: *Barwick* v. *English Joint Stock Bank* (1); *Mackay* v. *Commercial Bank of New Brunswick* (2); *Swire* v. *Francis* (3).

It is no answer to the Defendant's case to say that the Defendant made only a cursory examination into the facts; it is sufficient that he relied on the representations, unless indeed he can be proved to have had actual knowledge to the contrary: *Higgins* v. *Samels* (4); *Redgrave* v. *Hurd* (5).

In this case it is not necessary to say that *Dean* had power to sell. If he had only power to find a purchaser these are statements which it was within his authority to make; he was something more than a mere servant.

Millar, for the Plaintiffs, referred to *Weir* v. *Barnett* (6).

BACON, V.C.:—

This is a simple case. There is a written contract to buy a house; the subject is described with sufficient accuracy, the price is stated distinctly, and the day for the completion of the purchase is named; the contract is signed by both parties, and the vendor brings his action for specific performance. *Primâ facie* it is one of the plainest cases in the world.

The defence is that the vendor employed an agent to deal with the property, first for letting and then for selling it, and that representations were made by that agent which were wholly untrue, and that to hold the purchaser to such a bargain would be against every principle of justice. To that it is added that there was a further representation, going directly to the essence of the subject, made, not by the agent, but by one of the Plaintiffs themselves.

It is said that, before the Defendant had signed the agreement, the Plaintiff, Mr. *Bosanquet*, upon being asked by Mr. *Dean* if the property had not been mortgaged for £1500, said it had been mortgaged for more than that, namely, for £2000, and that this was a representation going directly to the value of the property, shewing that it was worth a great deal more than was being given

(1) Law Rep. 2 Ex. 259.
(2) Ibid. 5 P. C. 394.
(3) 3 App. Cas. 106.
(4) 2 J. & H. 460.
(5) 20 Ch. D. 1.
(6) 3 Ex. D. 32.

for it. That this was Mr. *Bosanquet's* own representation is stated by him in his evidence, in his answer to interrogatories, and in his evidence given in Court. The fact turns out, however, to be that though there had been a mortgage for £2000, it so little represented the value of the property that the Plaintiff, Mr. *Bosanquet*, who was a solicitor, and who made himself liable in that character for the negotiation and carrying into effect of this mortgage, had had to pay out of his own pocket the consideration for the reconveyance to himself and the co-Plaintiff of this very property, by the mortgagee, under the power of sale contained in the mortgage-deed. That representation was made by the Plaintiff, Mr. *Bosanquet*, himself, before the contract was signed.

Now a great deal of time has been occupied, and a great many cases have been referred to, on the question of the authority of an agent. A man employs an agent to let a house for him; that authority, in my opinion, contains also an authority to describe the property truly, to represent its actual situation, and, if he thinks fit, to represent its value. That is within the scope of the agent's authority; and when the authority is changed, and instead of being an authority to let it becomes an authority to find a purchaser, I think the authority is just the same. I think the principal does thereby authorize his agent to describe, and binds him to describe truly, the property which is to be the subject disposed of; he authorizes the agent to state any fact or circumstance which may relate to the value of the property. That, I take it, is clearly laid down in the cases referred to. It would be very dangerous, in my opinion, to limit the authority of an agent in the way in which the argument before me has proposed to limit it, namely, that the duty of Mr. *Dean* simply was to go out into the world and find a man likely to buy, and to bring him to the Plaintiff, the vendor, and to say, "Here is a man who is willing to buy." It has been argued that was his only authority.

Now what took place at Mr. *Dean's* house on the 11th of December is no doubt of great importance. A representation was was made by an agent who, as I think and as I hold, was authorized to make the representation if it was true, but who had no authority from his principal to state any falsehood. If he did state any falsehood on behalf of his principal, and if he thereby induced a purchaser to enter into a contract, he did that which

V.-C. B. 1882 MULLENS v. MILLER.

now prevents the principal from saying that the agreement shall be specifically performed. That I do not hesitate to say is my view of the law.

As to what took place on that day there is a direct conflict of evidence. [His Lordship reviewed this evidence, and came to the conclusion that what was practically uncontradicted was—that *Dean* represented that Mr. *Hemming* was ready to buy the property for £700; that if the Defendant were to give £50 more he would make a clear profit of 7 per cent.; that *Hemming* had offered to rent the warehouse at £300 a year, or the ground floor at £200; that he (*Dean*) advised the Defendant not to let *Hemming* have the whole, but to let to separate tenants; that as the Defendant would get £200 profit on the transaction he (*Dean*) should expect a present for his wife; that he (*Dean*) was to have for himself anything he got over £500; and that the property had been sold at auction for £1800, and that there was a mortgage upon it for £1600. His Lordship continued:—]

I bear in mind Mr. *Dean's* wholesale contradiction of almost everything that is said, and the explanation that he gives of having offered it for £300 to what he calls "Mr. *Hemming's* representative." That part of the case certainly does excite my surprise. Mr. *Dean* says there was a man, whom he mentions by name, whom he had seen sitting in Mr. *Hemming's* office, with papers before him at a desk. Mr. *Hemming* was examined as a witness. He says he never set eyes on Mr. *Dean* in his life, that he never had any such man as alleged by *Dean* employed in his office, that he had nobody but a clerk who kept the books, and who had nothing else to do. The story is that the transaction with *Olrich*, if there ever was such a person, was that *Dean* told him that he wanted £300, and *Olrich* said he would think about it, by which *Dean* concluded that he meant to ask his principal, and there the matter ends. There is not the slightest reason to suppose, upon the evidence before me, that there ever was any bidder for £700, or that there ever was any offer to rent, or anything of the sort. The whole facts alleged by the Plaintiffs are, in my opinion, disproved, and not in any degree to be relied upon.

On the 13th of December the Defendant and *Dean* are together, and the Defendant goes and looks at the property. Then they go

together to Mr. *Bosanquet's* office, and there the interview takes place between Mr. *Bosanquet* and Mr. *Dean*, in which Mr. *Bosanquet*, who, before that time, had said he would give *Dean* half beyond £500, agrees to give him all that could be produced beyond £500. Then the Defendant comes into the conversation, and that which is stated happens. He is asked whether he would like to put any questions, and he says he has no question to ask. If he had said, "Why should I ask you any questions? Mr. *Dean* has dealt with me, and has shewn me the property, and has explained to me all these things; I need not ask you anything, for I know all about it"—that would have been one thing, but there comes this, which I have before alluded to,—Mr. *Bosanquet* himself, before there was any binding contract, makes a representation to the Defendant (not in terms that the property is worth £2000, but) that it had been security for £2000. To what end was that said but to represent the value as being of that amount? As I have said, it turns out that, so far from the property having been a security for £2000, the supposed security was given up, and Mr. *Bosanquet* had to pay out of his own pocket the consideration for the reconveyance. I am aware that that was done as the result of a compromise, but I do not think that that alters the case in the slightest degree. You have the fact that there never was a valid, or beneficial, or useful mortgage for £2000, and that Mr. *Bosanquet* was compelled to pay money for having represented that it was worth the sum of £2000.

In my opinion the Defendant was induced to sign this contract upon a false representation made to him by *Dean*, and upon a false representation made to him—true in fact, but false and misleading in substance—by Mr. *Bosanquet*.

I am of opinion that the attempt to force this supposed contract upon the Defendant must entirely fail; that the Defendant is entitled upon his counter-claim to be released from the contract and to have back the £50 deposit; and that the Plaintiffs must pay the costs of this suit, including the costs of the counter-claim.

Solicitors: *E. W. Parkes; Peace & Co.*

J. B. D.

V.-C. B.

1882

Nov. 18, 25, 28.

JERVIS *v.* LAWRENCE.

[1867 J. 107.]

Mortmain—Charity—Improvement Bond—Mortgage of Rates—Pure Personalty—9 Geo. 2, c. 36 [Revised Ed. Statutes, vol. ii., p. 403].

By an Act passed for the improvement of a suburban estate, commissioners were empowered to make rates upon the occupiers of houses, lands, tenements, and hereditaments, within the limits of the Act, and to borrow at interest on the credit of the rates, and to assign over the rates or any part thereof as a security for repayment of the sums borrowed. If any person rated did not pay, power was given to the Commissioners to recover the rate by action of debt, or by distress and sale of the goods and chattels of such person.

By the *Metropolis Local Management Act*, 1855, the powers of the Commissioners in this and other like cases were vested in the vestries of the parishes, with power to require the overseers to levy and pay over sums required for the expenses of the execution of the Act; and the overseers for the purpose of levying such rates were to proceed in the same manner and with the same powers as for levying money for the relief of the poor. In case of non-payment of any rate, any justice might on complaint by the vestry issue a warrant for levying the amount by distress and sale of the goods of the overseers; but the vestries of certain parishes, including the parish in which this estate was situated, were themselves to levy the rates directly on the occupiers instead of on the overseers. In case of non-payment of principal or interest due on any mortgage under the Act, the mortgagee could obtain a receiver:—

Held, that an assignment by way of mortgage of a proportion of the rates arising under the *Improvement Act*, to secure the repayment of a sum advanced by the assignee, did not create an interest in land within the meaning of the *Mortmain Act*.

Petition.

William Henry Soare by his will, dated the 9th of August, 1861, after specific and pecuniary bequests, gave and bequeathed all the residue of his personal estate to the Defendants, *William Lawrence* and *Joseph Thomas Paul* (since deceased), (whom he also named executors), upon trust, subject to the payment of his just debts, funeral and testamentary expenses, to pay the yearly income thereof to *Clara Bertha Jervis* for life, for her sole and separate use, and after her decease, with all convenient speed, to sell such parts of the same as should not consist of money, and to

stand possessed of the proceeds thereof and of all other his residuary personal estate, upon trust to pay one equal sixth part of the clear residue thereof to the treasurer for the time being of the *Royal National Lifeboat Institution, London,* and five other equal sixth parts to as many specified charities respectively; with power to vary securities.

The testator died on the 27th of June, 1867, and the will was proved on the 27th of August, 1867, by *William Lawrence* alone.

The suit was instituted by bill, filed on the 28th of September, 1867, by *Clara Bertha Jervis* against *William Lawrence* for administration; and on the 9th of November, 1867, an administration decree was made. By an order, dated the 23rd of March, 1868, inquiries were directed as to the charities.

On the 5th of September, 1868, the Plaintiff married the Defendant, and the suit was revived by Mrs. *Lawrence* by her next friend against the Defendant *Lawrence,* and the trustees of their marriage settlement.

On the 7th of November, 1868, a decree of revivor and supplement was made, and by a certificate dated the 16th of April, 1869, the Chief Clerk found that the testator's undisposed of personal estate consisted of, amongst other items;

"£1000 due on 10 bonds of £100 each from the trustees of the *Norland* Estate, *Kensington.*"

The question whether this part of the personal estate "had arisen from, or was connected with" land, was reserved.

By an order on further consideration, made on the 23rd of June, 1869, it was amongst other things ordered that *Richard Lewis,* the secretary of the *Royal National Lifeboat Institution,* be appointed a new trustee of the will, jointly with the Defendant *William Lawrence.*

On the 20th of September, 1882, the Plaintiff, Mrs. *Lawrence,* died.

The present petition was presented by the *Royal National Lifeboat Institution,* submitting that the *Norland* estate bonds were pure personalty, and praying, amongst other things, that the executors, *William Lawrence* and *Richard Lewis,* might be directed to sell the five bonds, and divide the proceeds amongst the six charities.

V.-C. B. 1882 JERVIS v. LAWRENCE.

The next-of-kin opposed this part of the prayer, claiming the proceeds as being incapable of being held by a charity (1).

(1) The *Norland* estate bonds were created by an Act of Parliament of the 6 Vict. c. xxxiii. (31st of May, 1843), entitled, "An Act for the improvement of the *Norland* estate in the parish of *St. Mary Abbot's, Kensington*, in the county of *Middlesex*."

This Act appointed certain commissioners for carrying the Act into execution; and by sect. 46 empowered the commissioners "to borrow at interest on the credits of the several rates or assessments by the Act granted, and other property vested in such commissioners," any sum not exceeding £10,000; and enacted that "for securing the repayment of the moneys so borrowed, with interest, the commissioners, or any three of them, might assign over the said rates, assessments and property, or any part thereof, to the person who should advance or lend such money, or his trustee, as a security for the payment of the money so to be borrowed," with interest. Every such assignment or mortgage was to be by deed, and every such deed was to be under the hands and seals of three of the commissioners, and might be of the form given in Schedule A to the Act.

Sect. 102 was as follows:—"And in order to raise money for carrying the several purposes of this Act into execution, be it enacted, That it shall be lawful for the commissioners once in every year after the passing of this Act, to be computed from the twenty-fifth day of March, one thousand eight hundred and forty-three, or oftener as they shall think it necessary, to make one or more equal rate or rates, assessment or assessments, to be signed by the commissioners, upon the occupiers of all houses, shops, coachhouses, stables, cellars, buildings, gardens, lands, tenements, or hereditaments whatsoever within the limits of this Act, according to the annual value of the same, so as such rates or assessments do not exceed in any one year the sum of three shillings in the pound on such annual value except for the purpose of forming such sinking fund as hereinafter authorized to be made."

Sect. 105 enacted that the several rates made under the Act should be vested in the commissioners, and should be payable at such times as they should direct, to the collectors to be appointed by them.

By sect. 119 it was enacted that if any person rated under the authority of the Act should not pay any of the rates due from him for the space of fourteen days after demand in writing, it should be lawful for the commissioners "in case such person shall reside without the limits of this Act, in the name or names of any one or more of them, or of their clerk, to recover the same, with full costs of suit, by action of debt in any of Her Majesty's Courts of Record at *Westminster*; or any justice shall, on the application of the commissioners, or their collector, summon any such person to appear before him . . . . to shew cause why the rates due from him should not be made; and if such person shall not appear pursuant to the summons, or appearing shall not shew a reasonable cause for the nonpayment of such rate, the same shall be levied by distress, and such justice shall issue his warrant accordingly."

By sect. 123 it was provided that the owners of all houses, buildings, and other rateable property within the limits of the Act, the yearly rent or

Millar, Q.C., and *B. B. Rogers*, for the Petitioners:—

One of the earliest authorities is *Finch* v. *Squire* (1804) (1) before Sir *W. Grant*, M.R., which is opposed to our view that

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value whereof should not exceed £20, or which should be let to weekly or monthly tenants, or in separate apartments, should be rated, instead of the occupiers.

By sect. 134 the moneys to arise from the rates were to be applied, after payment of expenses of collection and salaries of collectors, in payment of "the interest upon all principal moneys which shall be borrowed on mortgage of" the rates, and in payment of the salaries of officers to be appointed under the Act, and of the expenses of carrying the Act into execution, and "in paying off the principal sums borrowed on the credit of the rates in such order as the commissioners shall direct."

Sect. 147 provided that where in the Act any sum of money, whether in the nature of penalty or otherwise was directed to be levied by distress, such sum of money should be levied "by distress and sale of the goods and chattels of the party liable to pay the same."

The following was the form of mortgage deed prescribed in schedule A, and which had been adopted in this case.

"By virtue of an Act passed, &c., intituled, &c., we, three of the commissioners appointed by (*or* by virtue of) the said Act in consideration of the sum of paid to us by *A. B.* of for the purposes of the said Act, do grant and assign unto the said *A. B.*, his executors, administrators, and assigns, such proportion of the rates or assessments arising by virtue of the said Act as the said sum of doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates or assessments, to hold to the said *A. B.*, his executors, administrators, and assigns from this day until the said sum of with interest at per cent. per annum for the same shall be fully paid and satisfied.

"In witness whereof we have hereunto set our hands and seals this day of one thousand eight hundred and "

Schedule (D) to the Act contained a form of warrant of distress. It was directed to one of the collectors of the rates under the Act, and after reciting particulars, required him "forthwith to levy the said several sums as hereinbefore mentioned, by distress and sale of the respective goods and chattels of the persons aforesaid." If no sufficient distress could be had and taken, a certificate was to be made "to the end that such further proceedings may be had as the law doth authorize and direct."

The parish of *St. Mary Abbot's, Kensington*, is comprised in Part II. of Schedule (A) of the *Metropolis Local Management Act*, 1855 (18 & 19 Vict. c. 120). By sect. 90 of this Act, all powers in relation to the improving of any parish mentioned in Schedule (A) then vested in any commissioners are vested in the vestry of the parish. By sect. 92 all expenses of improving any part of any parish mentioned in Schedule A are to be deemed expenses incurred in the execution of

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(1) 10 Ves. 41.

V.-C. B. 1882

JERVIS v. LAWRENCE.

this property is pure personalty; but that case, together with the subsequent decisions of *Ashton* v. *Lord Langdale* (1851) (1), before *Knight Bruce*, V.C., and *Thornton* v. *Kempson* (1854) (2),

the Act, and are to be defrayed accordingly.

By sect. 94 all moneys coming to the commissioners under any contract, agreement, bond, covenant, or security which would have been applicable by them, if the present Act had not passed, for the purpose of any of the duties or powers thereby transferred to any vestry, are to be paid over to the vestry, or as they may direct, and be applied for the like purposes.

Amongst the provisions for defraying the expenses of vestries are the following:—

Sect. 158 enacts that every vestry shall, from time to time, by order under their seal, require the overseers of their parish to levy and pay over to the treasurer of such vestry, or to any bank in such order mentioned, the sums which such vestry may require for defraying the expenses of the execution of that Act. Sect. 161 enacts that "the overseers of the poor of every parish to whom any such order as aforesaid is issued, shall levy the amount mentioned therein, according to the exigency thereof, and shall for that purpose make separate equal pound rates, upon their parish, or the part thereof upon which any sum specified in such order is required to be levied, in respect of each sum thereby ordered to be levied;" that is to say, a separate rate for defraying expenses of sewerage, a separate rate for expenses of lighting (where ordered); and a separate rate in respect of each sum ordered to be levied for defraying other expenses of executing that Act, to be called a general rate; "and shall make such respective rates of such amount in the pound on the annual value of the property rateable as will, in their judgment . . . . be sufficient to raise the sums specified in such order;" and such rates are to be levied on the persons and in respect of the property by law rateable to the relief of the poor, and are to be assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor; and the overseers are, for the purpose of levying such rates, to proceed in the same manner, and have the same powers as for levying money for the relief of the poor.

By sect. 166, "in case the amount ordered by any such order as aforesaid to be paid by the overseers of any parish be not paid in manner directed" and within the time specified by the order, any justice may, upon complaint by the vestry, issue his warrant for levying the amount, or so much thereof as may be in arrear, by distress and sale of the goods of all or any of the said overseers; and in case the goods of all the overseers be not sufficient to pay the same, the arrears are to be added to the amount of the next levy directed to be made in the parish for the purposes of the Act, and are to be collected by the like methods.

By sect. 167, "where the vestry of any parish mentioned in Schedule A to this Act make the rate for the relief of the poor in such parish, such vestry shall from time to time raise and levy the sums required for defray-

(1) 4 De G. & Sm. 402. (2) Kay, 592.

before *Wood* (Lord *Hatherley*), V.C., we maintain have been completely overruled.

ing their expenses of executing this Act in like manner as overseers are required to do with respect to the sums for which orders are made upon them by any vestry under this Act, and shall, in raising such sums, act upon the like principles and have the like discretion as any vestry making orders upon overseers under this Act."

St. Mary Abbot's, Kensington, was a parish in which the vestry made the poor-rate, and was therefore governed by sect. 167, and not by the previous sections as to rating.

By sect. 180 "all debts and liabilities legally charged upon or payable out of any rates or assessments authorized to be levied, or made under any Act relating to the improving of any parish" in Schedule A, or any part of any such parish, shall be charged upon the rates (other than sewerage and lighting rates) to be raised under that Act in such parish or part of a parish, and the several vestries shall cause the sums necessary for discharging such debts and liabilities to be raised in their respective parishes accordingly. The vestries are every year to set aside out of the rates charged such sums as they think proper, not being less than £3 per cent. where the amount of the principal debt does not exceed one-fourth of the rateable value of the property rateable, and in other cases not less than £2 per cent. on the amount of the principal debt, for the purpose of paying off the principal; except where the interest only of the debt is charged upon such rates and assessments. The sums so from time to time set aside, and all moneys applied in augmentation thereof, and the proceeds thereof, are to be applied and dealt with for the purpose of paying off such principal in manner as by the Act provided.

Sect. 188 provides that "if at the expiration of six months from the time when any principal money or interest has become due upon any mortgage made under this Act . . . . and after demand in writing, the same be not paid, the mortgagee may, without prejudice to any other mode of recovery, apply for the appointment of a receiver to two justices, who are hereby empowered, after hearing the parties, to appoint, in writing under their hands and seals, some person to collect and receive the whole or a competent part of the moneys or rates liable to the payment of the principal or interest in respect of which the application is made, until such principal or interest, or both, as the case may be, together with the costs of the application and the costs of collection, are fully paid; and upon such appointment being made all such moneys or rates, or such competent part thereof as aforesaid, shall be paid to the person appointed, and when so paid shall be so much money received by or to the use of the mortgagee or mortgagees;" and it is provided that no mortgagee shall be prejudiced "by any loss which may be occasioned by the misapplication or non-application of any moneys or rates received by any receiver appointed otherwise than upon the application or with the express consent of such mortgagee;" but such loss is to be "wholly borne by the mortgagee or mortgagees upon whose application or with whose express consent such receiver was appointed."

V.-C. B. 1882 JERVIS v. LAWRENCE.

On the other hand, there are in our favour the authorities of *Walker* v. *Milne* (1849) (1) before Lord *Langdale*, M.R., in which the first cited case is directly departed from; of *In re Mitchell's Estate* (1877) (2), in this branch of the Court, following *Gardner* v. *London, Chatham, and Dover Railway Company* (1867) (3), before the Lords Justices of Appeal; of *Attree* v. *Hawe* (1878) (4), before the Court of Appeal; and of *In re Harris* (1880) (5), before *Jessel*, M.R.

Vaughan Hawkins, *Edward Beaumont*, and *John Sayer*, junior, for other charities, supported the same contention.

Hemming, Q.C., and *Maitland*, for the next of kin:—

The decisions may be classified.

First, it was laid down by Lord *Loughborough*, in *Knapp* v. *Williams* (1798) (6), that a mortgage of turnpike tolls is within the statute. This was followed by *Howse* v. *Chapman* in 1799 (7), where Lord *Loughborough* held that *Bath* improvement bonds being instruments of the same kind as these *Norland* Estate bonds, were also within the statute. These cases are referred to and followed by the Court of Exchequer in *Rex* v. *Bates* (8), where *Thomson*, C.B., sums them up thus: "Bonds given by parishes to charge the poor's rates, and bonds for building a county gaol, payable out of the rates, have both of them been decided in the Courts of Equity to be such an interest as cannot be devised for charitable purposes." This was followed in *Rex* v. *Winstanley* (9). Then we have Sir *W. Grant's* decision in *Finch* v. *Squire* (10), dealing with money secured upon poor rates and county rates, and holding that these also were within the statute.

Then there is another class of authorities dealing with shares and mortgages of dock, canal, and railway undertakings. In *Walker* v. *Milne* such mortgages were held not to be within the statute. In *Ashton* v. *Lord Langdale* (11) a contrary decision was

(1) 11 Beav. 507.
(2) 6 Ch. D. 655.
(3) Law Rep. 2 Ch. 201.
(4) 9 Ch. D. 337.
(5) 15 Ch. D. 561.
(6) 4 Ves. 430, n.
(7) Ibid. 542.
(8) 3 Price, 341, 356.
(9) 8 Price, 180.
(10) 10 Ves. 41.
(11) 4 De G. & Sm. 402.

arrived at on this point, and in that case, in accordance with the earlier authorities, mortgages of turnpike tolls were held within the Act.

[BACON, V.C.: — Surely *Ashton* v. *Lord Langdale* (1) is as completely overruled as anything can be.]

What was overruled in *Ashton* v. *Lord Langdale* was only this, that mortgages of railway undertakings were interests in land. The decision that mortgages of turnpike tolls are interests in land, and within the Act, remains undisturbed. Shortly afterwards, in 1852, came the decision of Lord *St. Leonards*, L.C., in *Myers* v. *Perigal* (2), that shares in a joint stock bank were not within the statute. That was because such shares are shares in the profits, not in the real property, of the bank. *In re Mitchell's Estate* (3) decides only that railway debenture mortgages of the undertaking are not within the Act, following in this respect *Walker* v. *Milne* (4), reinforced as it was by *Gardner* v. *London, Chatham, and Dover Railway Company* (5). *Attree* v. *Hawe* (6) ruled that *Ashton* v. *Lord Langdale* was wrong as to the mortgages of the railway undertaking and tolls, not that it was wrong as to mortgages of turnpike tolls. How then can it be contended that *Knapp* v. *Williams* (7), *Howse* v. *Chapman* (8), and *Thornton* v. *Kempson* (9) are overruled?

It has been said that in *Attree* v. *Hawe*, *James*, L.J., delivering the judgment of the Court, laid down a rational interpretation of the statute, not only excluding from the operation of the Act the debenture stock in that case, as in this branch of the Court the debenture in *In re Mitchell's Estate* had been excluded on the ground that the instrument did not give to the holder the right of handling the actual receipts of the company, but merely gave him a share of the profits; but also involving a construction of the statute inconsistent with the decisions on turnpike, parish, and improvement bonds, including those of Lord *Loughborough*.

But to set aside these authorities in a case dealing with a

(1) 4 De G. & Sm. 402.
(2) 2 D. M. & G. 599.
(3) 6 Ch. D. 655.
(4) 11 Beav. 507.
(5) Law Rep. 2 Ch. 201.
(6) 9 Ch. D. 337.
(7) 4 Ves. 430, n.
(8) Ibid. 542.
(9) Kay, 592.

V.-C. B. 1882 JERVIS v. LAWRENCE.

different subject-matter could hardly have been the intention of the Court of Appeal, which has said that for them to overrule a decision of a Lord Chancellor would require a "tremendous" case—a case of clear error: *Wheeldon* v. *Burrows* (1); *Jarmain* v. *Chatterton* (2); *Henty* v. *Wren* (3). Moreover, in *Attree* v. *Hawe* (4), *James*, L.J. did not in terms refer to Lord *Loughborough's* decisions; and if *Thornton* v. *Kempson* (5) be on all fours with the present case, it is necessary to shew that that also has been overruled. In the argument for the Petitioners, *Attree* v. *Hawe* would not have been so much relied upon, but for the judgment of the Master of the Rolls in *In re Harris* (6). But the Master of the Rolls in that case does in fact point out the difference which exists in this case from the case he was then deciding, namely, that it is the actual right of collecting the rates which is here assigned (see sec. 188 above), not merely a share in the money when collected. No doubt this case would have been within the decision in *In re Harris* if the parish of *St. Mary Abbot's, Kensington*, had been one of those governed by the 158th and 166th sections of the *Metropolis Local Management Act*, 1855, but as it is one of the excepted parishes, governed by sect. 167, *In re Harris* has no application, and the *Norland* improvement bonds are, in all their incidents, absolutely like the parish bonds and *Bath* improvement bonds, which Lord *Loughborough* and other Judges have repeatedly held to be within the statute of 9 Geo. 2. There is no escape from the conclusion that these authorities apply, and, whatever *Attree* v. *Hawe* did, it cannot be taken to have overruled by inference two decisions of a Lord Chancellor, followed by two decisions in the Exchequer and several in the Chancery Courts of first instance, and remaining unquestioned law for more than eighty years.

Millar, in reply:—

Attree v. *Hawe* was the judgment not of *James*, L.J., alone, but of the whole Court, consisting of four Judges.

This property cannot be within the *Mortmain Act*, being recoverable only by action or by distress on goods and chattels.

(1) 12 Ch. D. 31, 47.
(2) 20 Ch. D. 493.
(3) 21 Ch. D. 332.
(4) 9 Ch. D. 337.
(5) Kay, 592.
(6) 15 Ch. D. 561.

There is no charge on land; nor any way in which land can be affected, except so far as the amount of the rate may affect the value of a house.

It is upon the opening sentence of the judgment and upon the general reasoning in *In re Harris* (1) that we rely.

BACON, V.C.:—

No doubt this case raises a very nice point, and I am very much obliged to counsel for the trouble they have taken in endeavouring to elucidate the law on the subject as far as possible, but one must come back to, or rather begin with, the Act of Parliament.

Now the Act of Parliament is very plain in its terms, and it sets a precedent which might be usefully followed by modern draftsmen of Acts of Parliament. It refers to the existing state of the law; it recites the fact that that law had become imperfect by certain contrivances recently resorted to, and that it was necessary to put a check on those contrivances, and to give effect to the old law of mortmain as applied to testamentary dispositions; and it declares that such dispositions shall be void as far as they relate to any charge or incumbrance affecting the land.

I will consider the case first without reference to the authorities, which, of course, I shall not neglect to refer to before I part with the case.

Is this a charge or incumbrance affecting the land? The right to levy for rates is conferred by an Act of Parliament which, applying itself to a district where building was going on for the first time, recognises the necessity of providing roads and squares, and so forth, things which ought to be done to make the land more valuable for owners of it whoever they may be. In return for that, or rather as compensation for the expenditure which would be incurred on that land, authority is given to levy a rate upon the occupiers or owners—upon the occupier first and upon the owner, if there is no occupier, of the land, for the purpose, and for the purpose only, of re-imbursing that expenditure by which the value of the property is to be increased.

Now what are the means of enforcing that contribution in the

(1) 15 Ch. D. 561.

V.-C. B. 1882 JERVIS v. LAWRENCE.

shape of rates? It may be enforced either by bringing an action against an owner or occupier who refuses or neglects to pay, or by issuing a distress warrant to levy upon his goods and chattels for the amount demanded. How does that affect the land? Not in any degree. The land cannot be sold by the incumbrancers, if the Commissioners can be called incumbrancers, and they cannot affect it or touch it. The land remains as it was—easily alienable by the owner, and not affected in any degree. Even if I were satisfied (and I am not) that the imposition of this rate diminished the value of the land, that would not affect the case.

The policy of the law being plain on the *Mortmain Act* of *George* II., and the matter in substance being, that the Commissioners who made a rate had a right to compel payment of it by distress on the goods and chattels of the owner, I ask again where is there an interest in the land? It is impossible that it can be said, and nobody can suggest that the land is burdened, or even if it is burdened, that the persons who claim the benefit have a right to touch the land.

I have been referred to a series of decisions including the cases of *Finch* v. *Squire* (1) and *Ashton* v. *Lord Langdale* (2), as establishing that a charge similar in its nature (as indeed it is very similar in its nature) to that which has been imposed by the Commissioners under this Act of Parliament, has been held to confer an interest in the land which by law would pass to the mortgagee. Now the case so often quoted was, no doubt, before the Court when *Ashton* v. *Lord Langdale* and *Walker* v. *Milne* (3) were discussed. In *Walker* v. *Milne* the decision is plainly and directly contrary to the notion that the securities on tolls there dealt with were an interest in the land. *Ashton* v. *Lord Langdale* as clearly decides that they are an interest in the land and within the *Mortmain Act*. That conflict of authorities was considered by the Court on two recent occasions. The Court did not hesitate to prefer the decision of Lord *Langdale* in *Walker* v. *Milne*, which is directly at variance with *Ashton* v. *Lord Langdale* and *Finch* v. *Squire*, and if it stood there only, I should be bound to hold that

(1) 10 Ves. 41. (2) 4 De G. & Sm. 402.
(3) 11 Beav. 507.

Finch v. *Squire* (1) was no longer the authority which it had theretofore appeared to be, because a Court of competent jurisdiction has overruled it.

But the matter does not rest there, for on the two recent occasions which have been referred to, those cases (and I suppose all the cases that were thought worth referring to were referred to) came before the Judges, and were then the subject of a very deliberate and well-considered judgment. It is not the judgment of Lord Justice *James* alone, but the judgment of all the Judges who had heard the appeal, viz. the present Master of the Rolls, Lord Justice *Baggallay* and Lord Justice *Bramwell*, and the first thing the Court does is to point out what is the effect and extent, and incidentally the policy, of the Act of Parliament.

I will not read again what has been read more than once by the learned counsel on both sides, but in the case of *Attree* v. *Hawe* (2) the Act is clearly and distinctly considered. Their Lordships say: "There is nothing really in the Act which has so far gone, or at all gone, beyond its recited object as to preclude the application of the rule of construction, the rule of common sense, that you are to construe the enacting part by the light of the recital of its object." That is a principle of construction of which I suppose no one would question the propriety. The scope and object of the statute being to prevent an invasion of the general law of mortmain, that object is accomplished by the terms of the enactment, and in no other way, and when I find, as I do in a note to the case of *Corbyn* v. *French* (3), this expression by the then Lord Chancellor in the case of *Knapp* v. *Williams* (4), "Consider what the point of law is, from the nature of the interest. It is not at all within the mischief, but the consequences would open a much larger field for charitable donations," it excites my surprise, as I am reminded it did on a former occasion. That is not a decision at all. It is legislation. What right has the Court to contemplate the opening of a larger field for charitable dispositions? I believe that fault has been committed in a great many of these cases. The Court saw that it was the object of the law to curb and restrict the powers of tes-

(1) 10 Ves. 41.
(2) 9 Ch. D. 337, 346.
(3) 4 Ves. 418.
(4) Ibid. 430, n.

V.-C. B. 1882 JERVIS v. LAWRENCE.

tators, and thought that if they found some disposition not within the mischief contemplated by the Legislature, their decision might be applied and extended so as to cover it. That, in my opinion, is not the law, and it is that which I should not follow, however venerable the authority by which it was enunciated. I find that in the two cases I have mentioned, the judgments of Vice-Chancellor *Knight Bruce* and Lord *Langdale* are directly at variance on this vital point; and I find that the judgment of Lord *Langdale* is to be preferred to that of Vice-Chancellor *Knight Bruce*. It is impossible that *Finch* v. *Squire* (1) and Lord *Langdale's* judgment can subsist; it is impossible that both of them can be right. Those cases were before the Court, and were well considered at the time, and their Lordships say (2): "It is impossible not to prefer the decision of Lord *Langdale* in *Walker* v. *Milne* (3) to the decision of Vice-Chancellor *Knight Bruce* in *Ashton* v. *Lord Langdale* (4)." I consider, therefore, that the case is covered by the decision in *Attree* v. *Hawe* (5), and that the reasons which are given at the conclusion of the judgment comprise the whole gist, force, and strength of the judgment. Their Lordships say (6), "The result is that the debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement, or hereditament, or any interest in land, tenement, or hereditament, or charge or incumbrance affecting land, tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is." According to my understanding that is a plain and distinct decision upon the very principle of the case which has been argued before me, for if it does not affect the land it is not within the statute, and if it is not within the statute it is within the power of the testator to deal with it as he thinks fit.

Whatever respect, therefore, I may be willing to pay to the earlier decisions (and I am willing to pay unbounded respect to them), I cannot possibly in the face of the later decisions, hold to them, and disregard what has been decided almost the other day, and decided not lightly, but after long argument and after

(1) 10 Ves. 41.
(2) 9 Ch. D. 348.
(3) 11 Beav. 507.
(4) 4 De G. & Sm. 402.
(5) 9 Ch. D. 337.
(6) Ibid. 351.

due deliberation; and it was expressed not *vivâ voce*, but in a written judgment, with the sanction of four learned Judges who heard the case argued before them. By no twisting of words or any contrivance of construction can it be said that the owners of these rates have any interest whatever in the land. They have a power of distress at the most. If a receiver were appointed (and under certain circumstances the Act provides for the appointment of a receiver) the receiver could only do that which the Act authorizes. A man who has a power of distress has no interest in the land. A landlord or lessor while the lease subsists has no present interest in the land; but he has a right to go by Common Law and under the Act relating to distress of *William* and *Mary* (1), on to the land and then and there to take all such chattels as can properly be a subject of distress. The object of the old law of mortmain is to prevent the inalienability of land. The same object is contained in the more modern Act which has been referred to. How does the right which the Commissioners or their assignee or mortgagee get to levy by distress on moveable chattels give any interest in the land? It is simply, in my opinion, impossible, after the decision in *Attree* v. *Hawe* (2). It is there plainly decided in the face of *Finch* v. *Squire* (3), and is in the face of all the cases that were examined. I do not think that the Exchequer cases or the case of *Howse* v. *Chapman* (4) were referred to, but enough was referred to to elucidate the principles and limit of the operation of the *Mortmain Act*. The construction put upon it brings it in my mind to the clearest possible demonstration that this was not within the mischief of the statute. The learned Judges there do not seem to have thought themselves competent to extend the operation of the Act so as to cover other mischief not contemplated by the Act, or to limit the sphere of the testator's donation. The case of *Attree* v. *Hawe* having been so decided, in my opinion, concludes this case.

But that is not the only case that has been referred to. There is the case of *In re Harris* (5), in which the Master of the Rolls,

(1) 2 W. & M. c. 5.
(2) 9 Ch. D. 337.
(3) 10 Ves. 41.
(4) 4 Ves. 542.
(5) 15 Ch. D. 561.

V.-C.B. 1882 JERVIS v. LAWRENCE.

in the most explicit terms, he having been a party to the judgment which I have just read, says (1), "I think that, looking at the decision in *Attree* v. *Hawe* (2), it is impossible now to say that these bonds are not pure personal estate. It appears to me that *Attree* v. *Hawe* decides that, in order to create an interest in land, the land must be affected directly." I am sure nobody would expect, in the present state of the law and as it is in the present day administered, that I should decide directly contrary to the words which I find in these two recent authorities, which are deliberate and well-considered decisions. It is true, it must be observed, that the case before the Master of the Rolls was very different from the case before me. There the Master of the Rolls found his way to decide the case upon the facts before him without any more direct reference than that which I have mentioned to the *Statute of Mortmain*. The Master of the Rolls quotes from a decision of Vice-Chancellor *Page Wood* the following passage (3): "The Vice-Chancellor there says, 'It is said, that these mortgages are by assignment of the rates when collected; and that the Commissioners are the persons to collect them, and must be taken to have them in their hands in the shape of money at the time of the mortgage, and thus the mortgagee cannot have an interest in property in the nature of a charge affecting the land itself, but only affecting the money so in the hands of the Commissioners. But I do not think that view to be correct.'" The Master of the Rolls had to deal with a case in which the claim was only against a person who had the money or the means of getting it into his hands, and availed himself of it. He says, "Then the Vice-Chancellor goes into a train of reasoning, which shews that if he had thought that view to be correct he would have decided the other way." The Master of the Rolls held that mode of stating the reasoning to be according to the true facts of the case, and upon that his decision is based. Having said that in the face of *Attree* v. *Hawe*, the former authorities cannot be maintained, and that it was not a case of a gift of pure personalty, he adds (4), "Now assuming that the case of *Attree* v. *Hawe* went a step further, I must say that it appears to

(1) 15 Ch. D. 563.
(2) 9 Ch. D. 337.
(3) 15 Ch. D. 564.
(4) Ibid. 565.

me that that case, overruling as it did *Ashton* v. *Lord Langdale* (1), would, upon the same principle overrule *Finch* v. *Squire* (2)." That seems to me to be irresistible. The two cases cannot stand together. The more recent decision must prevail. It is utterly impossible to reconcile them. It is wholly impossible to doubt what the four Judges, the Master of the Rolls and the three Lords Justices, said they meant in the case I first referred to. The Master of the Rolls says, "But it is not necessary for me to go so far as that, because the doctrine of *Finch* v. *Squire* was, that inasmuch as the rates were chargeable in respect of the ownership of the land and could be levied by distress, they were like rent; but of course that does not apply to the case before me, where, however remotely the persons who are ultimately responsible are so in respect of the land, the parties who charge the rates never can recover anything in respect of the land." In that respect that case and the present are one.

I am of opinion, therefore, having paid all possible attention to Mr. *Hemming's* argument, and to the authorities on which he relies, that this case is clearly not within the *Mortmain Act*, and if it is not within the statutory enactment of the Act, there is no reason whatever that the gift of the testator should not prevail, or why it should not be treated as pure personalty.

There will be an order as prayed by the petition; the costs of all parties to come out of the fund.

Solicitors: *Clayton, Sons, & Fargus; Palmer, Eland, & Nettleship; Fladgate, Smith, & Fladgate; Hyde, Tandy, & Mahon; Taylor, Hoare, & Taylor.*

(1) 4 De G. & Sm. 402.

(2) 10 Ves. 41.

J. B. D.

FRY, J.

1882

Nov. 13, 14.

ANDREW *v.* AITKEN.

[1880 A. 1293.]

Covenant—Restrictive—Running with the Land.

22 L.D. 516

Land was granted in fee in consideration of a rent-charge, and the deed of grant contained a covenant to build houses on the land the rent of which should be double the value of the rent reserved by the deed, without limiting any time within which such building was to be required.

Held, that such covenant was unusually restrictive.

Semble, that although the assignee of the grantee of the land was not liable affirmatively on such covenant, he might be called on to allow the house to be built in accordance with the covenant.

THIS was an action for the specific performance of a contract dated August, 1880, by which the Plaintiff agreed to sell and the Defendant to purchase a plot of land at *Manchester* and a dwelling-house thereon subject to a yearly rent of £84 17*s.* 10*d.*, made payable by an indenture of the 20th of March, 1863, made between Sir *J. Anson* of the one part and *C. J. Samuels* of the other part, and to the provisoes and covenants on the part of the said *C. J. Samuels* therein contained.

The Defendant resisted specific performance, and by counter-claim asked for a rescission of the contract, on two grounds. The first of these grounds was that the house had been represented to be in a habitable condition, and that it was not habitable by reason of dry rot. The Court held that this contention of the Defendant failed, and this part of the case does not call for a report.

The second ground was this. The Plaintiff's solicitors had made what the Court held to amount to a representation that the deed of March, 1863, contained no covenants unusually restrictive, and the question was raised whether such representation was true in fact.

The Defendant contended that the first covenant in the deed was unusually restrictive. Such covenant was in the following form: "That the grantee, his heirs, executors, administrators, or assigns, would at his own expense, at the request of the grantor, his

heirs and assigns, to the satisfaction of the surveyor of the grantor, his heirs or assigns, erect and build on the plot of land one or more good and substantial house or houses, which with the buildings at the date of the deed erected thereon should be of the clear yearly tenantable value of double the amount of yearly rent reserved by the deed at least, each of which said dwelling-houses should be of the clear yearly tenantable value of £40 or upwards."

They produced evidence that the usual form of covenant in the district was to build within a limited time, usually two years.

Everitt, Q.C., and *Ingle Joyce*, for the Plaintiff:—

The covenants are not unusually restrictive. The affirmative covenant imposing a liability to build cannot be enforced against an assignee of the grantee: *Haywood* v. *Brunswick Permanent Building Society* (1); *London and South Western Railway Company* v. *Gomm* (2).

Glasse, Q.C., *Cookson*, Q.C., and *G. A. Watson*, for the Defendant:—

[FRY, J.:—The purchaser cannot probably prevent another person from building in accordance with the covenant: *Tulk* v. *Moxhay* (3).]

The covenant to build is commonly limited to two years, and the precedents in *Bythewood*, *Davidson*, and *Prideaux* are so drawn. The Defendant may be sued on this covenant: *Cooke* v. *Chilcott* (4).

[FRY, J., referred to *Lucas* v. *James* (5).]

Everitt, in reply:—

Cooke v. *Chilcott* was disapproved in *Haywood* v. *Brunswick Permanent Building Society*.

FRY, J., stated the facts, and said:—

With regard to the first covenant, namely, to build an additional house or buildings at any time at the request of Sir *John*

(1) 8 Q. B. D. 403.
(2) 20 Ch. D. 562.
(3) 2 Ph. 774.
(4) 3 Ch. D. 694.
(5) 7 Hare, 410.

FRY, J.
1882
ANDREW
v.
AITKEN.

Anson, the evidence of the Defendant goes into particulars, and it tends to shew that the ordinary covenant with regard to building where a ground rent is reserved is that the grantee shall build within a definite period of no long duration, generally two years at the longest; and I come to the conclusion that this covenant, which was indefinite in point of duration, was not a usual covenant.

If it was not usual, was it unusually restrictive? It appears to me that it was. If the usual covenant had been there, the result would have been this, that a person who bought a house which had been the subject of a grant or reservation of a rent-charge in 1863 would have been able to use all the land not occupied by the house in any manner which he might think convenient, whereas persons buying under the covenant actually contained in this lease of 1863 took it subject to an obligation that it should become the foundation of another house and other buildings at any time that Sir *J. Anson* might require. Therefore I think that the user of the land was restricted in a manner which was not common with regard to houses which had been erected under grants seventeen years old.

But then the Plaintiff says, Even if that were so the Defendant is not hurt, because under the law of the Court, especially as recently expounded by the Court of Appeal, it is plain that he could not be called upon to put his hand into his pocket and lay money out on building a house. That may well be. It is a point which I am not called upon to determine. I do not express the least doubt that the Plaintiff is right in that contention, but that does not in my judgment determine the matter. It may well be that although the Plaintiff could not be called upon to build the house, he might be called upon to allow the house to be built, and the difficult question might arise with regard to the extent to which that liability existed. He might be harassed in an action relying on *Spencer's Case* (1); he might be harassed with an action relying on *Cooke* v. *Chilcott* (2), which, although undoubtedly more or less infringed upon by the recent decision in the Court of Appeal, was not expressly overruled by them. He might be harassed with an action founded upon the fact that he had agreed to take subject to the covenant, and it might be that taking

(1) 5 Rep. 16 a. (2) 3 Ch. D. 694.

subject to the covenant he might be liable to allow the house to be built if the covenantor in the original contract preferred to build rather than pay the damages to Sir *J. Anson*. These appear to me to be questions of some nicety, and therefore questions from which the Defendant desired to protect himself. I hold, therefore, that in that particular there has been what amounts to a misrepresentation.

The Plaintiff therefore, in my judgment, fails, and I think that the Defendant is entitled on the ground of mistake induced by the Plaintiff to the rescission of the contract, and therefore the Plaintiff fails not only as regards specific performance but also as regards damages.

Solicitors for the Plaintiff: *Gregory & Co.*
Solicitors for the Defendant: *Pitman & Son.*

C. W. C.

ATTORNEY-GENERAL *v.* ACTON LOCAL BOARD.

[1877 A. 125.]

Drainage—Local Board—Right to send Sewage into Sewers of adjoining District—Injunction—Trivial Damage—Claim of Right—Mandatory Injunction—Stopping up existing drains—Suspension of Injunction—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 220 [*Revised Ed. Statutes, vol. xii. pp.* 693, 718]—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 23.

Notwithstanding the obligation imposed on a local board by the *Public Health Act*, 1875, to drain their district, their right to send the sewage of their district, directly or indirectly, into the sewers belonging to the sanitary authority of an adjoining district is, in the absence of express enactment or agreement, no higher than the right of a landower to send sewage from his land on to the land or into the drains of a neighbouring landowner.

If, therefore, a prescriptive right has been acquired to send some sewage from one district into the sewers of another, the burden cannot be increased without the consent of the sanitary authority of the latter district.

The *ratio decidendi* of *Metropolitan Board of Works* v. *London and North Western Railway Company* (1) applies to a local board just as it does to an ordinary landowner.

Injunction granted in the absence of proof of substantial damage, on the

(1) 17 Ch. D. 246.

FRY, J.

1882

ATTORNEY-GENERAL v. ACTON LOCAL BOARD.

ground that the Defendants by their pleading claimed a right to continue doing that which the Court held they were not entitled to do.

In an action by a sanitary authority to restrain the sanitary authority of a neighbouring district from authorizing or directing sewage from their district to flow into the sewers of the Plaintiffs, the Court granted an injunction as to the future, but refused to grant a mandatory injunction to compel the stopping up of existing drains; (1), Because to do so would cause serious inconvenience to the district, and (2), Because it is doubtful whether a local board have power to stop up drains which they have once authorized to be connected with their sewers.

And, inasmuch as the injunction granted applied only to the future, the Court refused to suspend its operation.

THIS action was brought by the Attorney-General, at the relation of the Metropolitan Board of Works, and by the Metropolitan Board of Works as Plaintiffs, against the Local Board for *Acton*, claiming an injunction, (1), to restrain the Defendants from permitting, directing or authorizing any sewage to flow into a sewer or stream called the *Stamford Brook* (*West Branch*) or any other stream or watercourse running into or communicating therewith so as to cause a nuisance to the public; and also, (2), to restrain the Defendants from permitting, directing, or authorizing any sewage to flow or be discharged by or through the *Stamford Brook* (*West Branch*) or otherwise either directly or indirectly into the metropolitan main drainage system, or any sewer vested in the Plaintiffs.

The Metropolitan Board of Works were incorporated by that name by the *Metropolis Local Management Act*, 1855 (18 & 19 Vict. c. 120).

By sect. 135 of the Act it is enacted that "the sewers mentioned in schedule D. to this Act, being the main sewers now vested in the Commissioners of Sewers of the City of *London*, and in the Metropolitan Commissioners of Sewers respectively . . . . shall be vested in the Metropolitan Board of Works, and such Board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river *Thames* in or near the metropolis . . . . and shall also make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this Act, as they may from time to time think necessary for the effectual sewerage and drainage of

the metropolis . . . . and all sewers and works from time to time made by the said Board shall vest in them."

By sect. 250 of the Act the "metropolis" is defined as including the City of *London*, and the parishes and places mentioned in schedules A., B., and C. to the Act. The parish of *Acton* in *Middlesex* is not included in either of the schedules A., B., or C., but the adjoining parish of *Hammersmith* is included. Amongst the sewers mentioned in schedule D. are two called *Stamford Brook* (*West Branch*), and *Stamford Brook* (*East Branch*). These sewers were originally natural streams or watercourses, which flowed in a direction approximately from N. to S. and united at a place called *Paddenswick Green* (within the metropolis as defined by the Act of 1855), whence the stream formed by the union flowed into *Hammersmith Creek*, where it discharged into the *Thames*. The *Stamford Brook* (*West Branch*) flowed through the parish of *Acton*, outside the metropolis as defined by the Act of 1855, and entered the metropolis at a point in the boundary between the parishes of *Acton* and *Hammersmith*. The brook supplied the natural drainage of the parish of *Acton*. At the time when the action was commenced the united *Stamford Brook* was intercepted by a branch of the *Northern Low Level Sewer*, constructed by the Metropolitan Board. That sewer was carried in an easterly direction to a pumping station, belonging to the Metropolitan Board, called the *Western Pumping Station*, situate in *Grosvenor Road, Pimlico*, at which the sewage, including that which flowed through *Stamford Brook*, was pumped to a higher level. The *Northern Low Level Sewer* was then carried on in an easterly direction to a pumping station at *Stratford*, in *Essex*, known as the *Abbey Mills Pumping Station*, where the sewage was again pumped up. The sewage was ultimately discharged into the *Thames* at *Barking*.

Prior to the passing of the Act of 1855 the drainage of both the parishes of *Acton* and *Hammersmith* was subject to the jurisdiction of the Metropolitan Commissioners of Sewers, in whom the sewers in both parishes were vested, and the sewage from the houses in *Acton* parish drained into *Stamford Brook* (*West Branch*), and so passed ultimately by *Hammersmith Creek* into the *Thames*. After the incorporation of the Metropolitan Board,

FRY, J.
1882
ATTORNEY-GENERAL v. ACTON LOCAL BOARD.

they constructed sewers which intercepted *Stamford Brook*, and carried the sewage into the metropolitan main sewage system. *Stamford Brook* was to a great extent arched over, and became a brick sewer both in *Acton* parish and in *Hammersmith* parish, but part of it in both parishes remained an open sewer. The number of houses in *Acton* parish gradually increased by the erection of new houses, the drains of which were from time to time connected with *Stamford Brook*, and thus the amount of sewage flowing from *Acton* parish into *Stamford Brook*, and from it into the metropolitan system, increased from year to year.

In the year 1868 the parish of *Acton* adopted the provisions of the *Local Government Act*, 1858, and the Local Board of *Acton* was constituted under the provisions of that Act and the *Public Health Act*, 1848. Under the provisions of the *Public Health Act*, 1875, the Defendants became the urban sanitary authority for the district of *Acton*, and as such succeeded to all the property, rights, and liabilities of the Local Board, and had the entire management and control of the sewers in their district. In 1861 the number of houses in the parish of *Acton* was 649; in 1877 the number of houses had increased to 2200, and it continued to increase afterwards.

The drainage of these houses was by the direction and authority of the Defendants discharged into sewers belonging to the Defendants, and thence into *Stamford Brook* (*West Branch*). The Plaintiffs alleged that by this means a large and constantly increasing quantity of sewage was discharged into *Stamford Brook*, and that the effect was to throw on them the cost of disposing of the sewage of *Acton*, which the Defendants ought to dispose of at the cost of their district, and that this sewage had to be pumped up at the Plaintiffs' pumping station in *Grosvenor Road*, at considerable additional expense.

The Plaintiffs also alleged that, in consequence of the increase of sewage thus discharged into *Stamford Brook*, a public nuisance was caused, especially at that part of *Stamford Brook* which was uncovered. In November, 1876, the Plaintiffs gave the Defendants notice in writing to discontinue the passage of sewage from their district into the Metropolitan Main Drainage system, and threatened legal proceedings if they did not do so. The

notice was not complied with, and the action was commenced on the 13th of July, 1877. No application was made for an interlocutory injunction.

The Defendants, by their statement of defence, denied the alleged nuisance. They alleged that the inhabitants of the parish of *Acton* had been accustomed to use the *West Branch* of *Stamford Brook* as a sewer from time immemorial, and that no part of that branch had ever been deepened, or its mean capacity increased by the Defendants or any other sewage or local authority within the last twenty years. The Defendants also alleged that when the portions of *Stamford Brook* enumerated in Schedule D. of the Act of 1855, were vested in the Plaintiffs, they were public sewers, and that the Plaintiffs acquired those portions subject to the rights of the public, or at least of the inhabitants of the parish of *Acton*, to use those sewers as they had from time immemorial been accustomed to use them.

The Defendants further said (par. 22), that in compliance with their duties under the *Public Health Acts*, and with a view to promoting the health of their district, they had caused fresh drains to be connected as occasion had from time to time arisen with their main sewer, the *West Branch* of *Stamford Brook*, within their own district, but not within the Metropolitan District.

The Defendants insisted that they had the right, statutory or otherwise, to allow sewage to drain directly into *Stamford Brook* (*West Branch*), and that the Plaintiffs had acquired no right to prevent them or the inhabitants of *Acton* from draining into it.

The Defendants also alleged that the sewage matter from their district which ultimately reached the Plaintiffs' western pumping station made no appreciable difference in the cost of pumping, and that, even if the cost was thereby increased, the increase was occasioned by the Plaintiffs' own act in intercepting the sewage which flowed along *Stamford Brook* without the consent of the Defendants or any notice to them. The Defendants also insisted that the Plaintiffs were by their *laches* and acquiescence barred from obtaining any relief to which they might otherwise be entitled.

By the evidence of Sir *J. W. Bazalgette*, the Chief Engineer to the Metropolitan Board, it appeared that the expense to which

FRY, J.
1882
ATTORNEY-GENERAL v. ACTON LOCAL BOARD.

the Board were put in respect of pumping up the sewage from *Acton* which flowed through *Stamford Brook* was mainly caused, not by sewage, properly so called, but by the storm waters resulting from heavy rainfalls.

Cookson, Q.C., *Everitt*, Q.C., and *F. Pownall*, for the Plaintiffs:—

We may not be entitled to restrain the Defendants from permitting sewage to flow into our sewers, that is from not taking steps to prevent the owners of houses from draining into our sewers, but we are entitled to restrain the Defendants from directing or authorizing sewage to flow into our sewers: *Glossop* v. *Heston and Isleworth Local Board* (1); *Attorney-General* v. *Guardians of Poor of Union of Dorking* (2). The Defendants have no title by prescription to use our sewers; the only prescription is in favour of those owners of houses who have drained into our sewers for the period necessary to acquire such a right. The Defendants cannot increase the burden cast on us: *Metropolitan Board of Works* v. *London and North Western Railway Company* (3). We are only bound to take such sewage as came from *Acton* into *Stamford Brook* at the time when our Act of 1855 was passed. *Newington Local Board* v. *Cottingham Local Board* (4) does not apply. Even if the damage done to us is small we are entitled to an injunction, because the Defendants expressly claim a right to continue to do what they are doing and to increase the burden on us: *Rochdale Canal Company* v. *King* (5). We are entitled to a mandatory injunction from the date of our notice in November, 1876: *Smith* v. *Day* (6).

The fact that the Defendants have statutory powers and duties does not authorize them to send the sewage of their district into our sewers, there being no express authority to do so: *Attorney-General* v. *Council of Birmingham* (7); *Attorney-General* v. *Colney Hatch Lunatic Asylum* (8). The Defendants must find out a way of fulfilling their statutory obligations.

(1) 12 Ch. D. 102.
(2) 20 Ch. D. 595.
(3) 14 Ch. D. 521; 17 Ch. D. 246.
(4) 12 Ch. D. 725.
(5) 2 Sim. (N.S.) 78.
(6) 13 Ch. D. 651.
(7) 4 K. & J. 528.
(8) Law Rep. 4 Ch. 146.

E. K. Karslake, Q.C., *W. W. Karslake*, Q.C., and *Pollard*, for the Defendants:—

No case of nuisance has been proved. The Plaintiffs alleged a pressing case of nuisance, and served on us notice of motion for an injunction, and then abandoned their motion.

The Court cannot restrain us from permitting the owners of houses to drain into our sewers; the injunction must be limited to positive acts of ours. We can only be restrained from authorizing or directing the connection of drains with our sewers: *Attorney-General* v. *Guardians of Poor of Union of Dorking* (1); *Glossop* v. *Heston and Isleworth Local Board* (2).

When the sewers in the parish of *Hammersmith* vested in the Plaintiffs by sect. 135 of the Act of 1855, they vested subject to the right or easement of the inhabitants of *Acton* to drain into them: *Newington Local Board* v. *Cottingham Local Board* (3). *Stamford Brook* is the natural outfall of the drainage of *Acton*, and it is admitted that the Plaintiffs must provide for the storm water. They do not say they cannot carry the sewage of *Acton*; what they complain of is the sewage plus the storm-water. They have themselves diverted both into their system by means of their intercepting drains, and they cannot now complain of the result of their own acts.

The principle of *Metropolitan Board of Works* v. *London and North Western Railway Company* (4) does not apply. It is not like the case of a private owner of land. The Plaintiffs and the Defendants are both creatures of statute. The duty of draining their district is imposed on the Defendants by the *Public Health Act*, 1875, ss. 15, 23, as the same duty was imposed on their predecessors by the *Public Health Act*, 1848, and the *Local Government Act*, 1858: *Attorney-General* v. *Guardians of Poor of Union of Dorking*; *Stainton* v. *Metropolitan Board of Works* (5). A private landowner may not be able to increase the burden on his neighbour, but the doctrine does not apply to a statutory corporation who are bound by statute to drain their district.

(1) 20 Ch. D. 595.
(2) 12 Ch. D. 102.
(3) 12 Ch. D. 725.
(4) 17 Ch. D. 246.
(5) 23 Beav. 225.

FRY, J.
1882
ATTORNEY-GENERAL v. ACTON LOCAL BOARD.

[FRY, J.:—There is no obligation on the *Acton* Board to drain their district into this particular stream.]

It is the natural outfall.

[FRY, J.:—Then you could defile any stream?]

Sect. 17 of the *Public Health Act*, 1875, prevents us from defiling a pure stream, but this stream had ceased to be pure long before we came into existence. The Defendants are not responsible for the building of new houses in *Acton*, but when they are built they are bound to drain them.

The inhabitants of a district may prescribe for an easement: *Comyns'* Digest (1); *Gateward's Case* (2); *Baker* v. *Brereman* (3).

[FRY, J.:—Can anyone but the Crown make a grant to inhabitants of a place? Such a grant would make them a corporation. Therefore, inhabitants cannot prescribe except against the Crown.]

The Court will at any rate not grant a mandatory injunction having regard to the balance of convenience, and considering also that it is doubtful whether the Defendants have power to compel the owners of houses to stop up their drains: *Attorney-General* v. *Colney Hatch Lunatic Asylum* (4); *Attorney-General* v. *Guardians of Poor of Union of Dorking* (5).

Cookson, in reply.

FRY, J., after stating the facts, and deciding that no case of nuisance had been established by the evidence, continued:—

The result is, that the action must be dismissed, so far as it seeks the relief mentioned in the first paragraph of the claim, with costs to be paid by the relators.

The next question which arises relates to the sewers or drains which have been made by the Defendant board since they have come into existence. The admissions in the statement of defence and the evidence satisfy me of that, which indeed has not been

(1) 5th Ed. vol. vii. p. 101.
(2) 6 Rep. 59 b.
(3) Cro. Car. 4th Ed. p. 418.
(4) Law Rep. 4 Ch. 146.
(5) 20 Ch. D. 595.

denied, viz., that the Defendants, in pursuance of their duty, as they considered it, caused or directed, or authorized the construction of drains from houses which have been newly erected in their district into this brook. [His Lordship read paragraph 22 of the statement of defence.] About that, therefore, there has been very properly no dispute.

Moreover, the Defendants claim the right to continue to cause new drains to be connected with the *West Branch* of *Stamford Brook*. They allege, and Mr. *William Karslake* has argued, that the inhabitants of *Acton* have a right by prescription to drain into the brook. This contention appears to me to be clearly bad. No evidence has been tendered on which, in my opinion, I can come to the conclusion that there is any such prescription or any legal custom authorizing such a drainage. Those persons who have had drains connected with the brook, and who have used them for the legal period of prescription, cannot be interfered with. Other persons living in *Acton* have, according to the evidence before me, done the same thing without any prescriptive right or any custom, and the Defendant board will, unless restrained, continue to increase the amount of the sewage flowing from their district into the *West Branch* of *Stamford Brook*.

Then arises the inquiry whether the sewage which they have thus caused to flow into the brook, and which they threaten and intend in future to cause to flow into it, is sewage which they are entitled to require the Plaintiffs to dispose of. It has been argued that under their Act of 1855 the Plaintiffs are bound to dispose of this sewage. I say nothing as to sewage which existed in the year 1855, or as to sewage flowing from houses which have acquired a prescriptive right, but I am unable to find anything in the Act which casts upon the Plaintiffs the burden of disposing of such sewage as the inhabitants of *Acton* may think fit to create by building new houses after the passing of the Act of 1855. This is all the more important, because the Legislature have thrown upon the Plaintiffs the burden of disposing of all the sewage within their district, and of preventing its flowing into the *Thames*. If, therefore, up to 1855 the inhabitants of *Acton* had no right to throw their drainage into this brook, and they have now the right to do so by force of the Act, the result is that they are at liberty, and

FRY, J.
1882
ATTORNEY-GENERAL v. ACTON LOCAL BOARD.

have the right, to put their sewage in such a position as to cast on the Plaintiffs the burden of preventing it from going into the *Thames*.

Now the Plaintiffs, in pursuance of their duty, have intercepted the brook in question at two points, and the effect of those interceptions has been to carry, so far as they can, the whole of the sewage from the *East* and *West Branches* of *Stamford Brook* parallel to the *Thames*, and to carry all the storm water which they can carry in the same direction, leaving only the surplus storm water to flow into the *Thames*. There is plainly, therefore, an increased burden thrown upon the Plaintiffs by every increase of the sewage passing into the brook, and, as I have already said, it appears to me that there is nothing in the Act of 1855 which throws on the Plaintiffs any such increased burden.

But it is said that, if the Act of 1855 did not authorize the Defendants thus to increase the burden on the Plaintiffs, the *Public Health Act* of 1848, or the *Local Government Act* of 1858, or the *Public Health Act* of 1875, under which the Defendants have been constituted or act, authorizes them to do so. In my judgment there is no justification for such a contention. I consider it to be well established that local boards are bound to perform their statutory duties without injury to their neighbours. They cannot create a nuisance affecting a neighbour, and, in my judgment, they cannot cast upon a neighbour a greater burden than he is already bound to bear. I am therefore driven to this inquiry: Irrespectively of any statute, can the owner of land on the higher part of a stream cast upon the owner of land on the lower part of the stream the burden of disposing of a greater amount of sewage than has by prescription flowed into it? That point appears to me to have been decided by the Court of Appeal in *Metropolitan Board of Works* v. *London and North Western Railway Company* (1). There Lord Justice *James* said (2): "On the facts it is quite clear there were no such prescriptive rights as have been alleged. If a man has an artificial drain or sewer by which he drains anything, either water or sewage, into his neighbour's land, he cannot use that drain so as to drain another close or another house. It seems to me impossible to suppose that

(1) 17 Ch. D. 246. (2) 17 Ch. D. 249.

there is anything in the English law to say that a man has the right to pour in as much sewage water as can come from anywhere, limited only by the size of the particular drain." And Lord Justice *Cotton* said (1): "There is no authority given by the Act to do it" (that is, to increase the sewage), "and according to the general law they have no right to throw any burden on their neighbours unless by contract, which in this case does not exist, or by long user, that is to say, by prescription, which does not exist here." And Lord Justice *Lush* entirely agreed with that decision.

The Plaintiffs therefore are, in my judgment, right in saying that they are not liable to any greater burden of sewage than that which comes from the houses of those persons who have acquired a prescriptive right to throw it into the brook.

But then arises this point. The Plaintiffs have not shewn that any substantial damage has resulted to them from an increase of the sewage thrown into the brook. According to the evidence of Sir *Joseph Bazalgette*, the real annoyance and burden of which the Plaintiffs complain is, that by reason of the foul state of the brook they have been compelled to cover it over, and that, by reason of the storm water collected in the *Acton* district and flowing along their intercepting sewer, the Plaintiffs' pumping stations are burdened and at certain times overtaxed. I have, therefore, to inquire whether such substantial damage has been proved, or whether such a question of right is involved, that I ought to grant an injunction. In many similar cases probably I should not think myself bound to grant an injunction, but in the present case I feel bound to do so for this reason—that not only do the Defendants insist on their right to maintain the sewers which they have already caused to be constructed, but they insist upon a right to construct in the future other drains, which they say they are authorized to do by the prescriptive title of the inhabitants of the district over which they preside. They insist, therefore, not only on maintaining the wrong which they have committed, but on a right to do an increased wrong in the future. That, in my judgment, is a circumstance to which I must have regard, and I think it compels me to grant an injunction. I,

(1) 17 Ch. D. 250.

FRY, J.
1882
ATTORNEY-GENERAL v. ACTON LOCAL BOARD.

therefore, grant an injunction according to the second part of the Plaintiffs' claim, omitting the word "permitting."

The Plaintiffs have also asked me to restrain the Defendants from permitting sewage to pass into the *West Branch* of *Stamford Brook* through any sewers or drains constructed or authorized by the Defendants since the notice given by the Plaintiffs in 1876. In my opinion I ought not to do that. The Plaintiffs have not been over diligent or active in the assertion of their rights. They must have known, I think, some time before 1876 that the local board was carrying on its operations. Then they followed up their notice by an action begun some eight months afterwards, and the action, having begun in 1877, has not been brought on for trial until now. The reason assigned for this delay is that the Plaintiffs preferred to wait for the decision of their action against the *London and North Western Railway Company*. It is quite true that the Defendants might have driven the Plaintiffs on, and that in a general way the Court looks at things as they stood at the date of the writ. But in the present case to grant the injunction asked for would involve most serious consequences. It would require the Defendants to stop up all the drains or sewers which have been made from houses in *Acton* since November 1876. Those houses, according to the evidence before me, are very numerous, and, on the balance of convenience and inconvenience, bearing in mind also that no substantial damage is shewn to have accrued to the Plaintiffs, I think I should be doing wrong in granting such an injunction. Moreover, I am by no means clear that the Defendants have power to stop up a drain the construction of which they have once authorised or directed. I observe that the Master of the Rolls expressed that view in *Attorney-General* v. *Guardians of the Poor of the Union of Dorking* (1). Therefore, on that ground also I should hesitate very long before I granted the mandatory injunction which is asked for.

[His Lordship then dealt with the alleged acquiescence on the part of the Plaintiffs, holding that that objection failed, and continued:]— There remains the question of the costs, so far as I have not already disposed of them. I think the costs have

(1) 20 Ch. D. 595, 606.

been considerably increased by the contention originally raised by the pleadings that the Defendants ought to be restrained from permitting sewage to flow into the brook, and I think the Plaintiffs ought to pay those increased costs. Therefore I propose to give the costs of the action (other than those which I have already dealt with) to the Plaintiffs, deducting £50 in order to save the expense of a taxation.

E. K. Karslake asked that the injunction might be suspended for a time.

Cookson opposed.

FRY, J., refused the application, on the ground that the injunction which he had granted applied solely to the future.

Solicitor for Plaintiffs: *R. Ward*
Solicitors for Defendants: *Hemsley & Hemsley.*

W. L. C.

MILLER *v.* HUDDLESTONE.

[1843 M. 25.]

Sequestration—Chose in Action—Bankers.

Where a sequestration had been issued against *A.*:—
Held, that *A.'s* balance at his bankers might be attached under it, and that the Court had jurisdiction to order the bankers to verify and pay the balance to the sequestration account.

IN this action a writ of sequestration was issued against the real and personal estate of *William McMurray* on the 24th of June, 1882.

The sequestrators entered into possession of considerable property of the Defendant *McMurray* in pursuance of the sequestration, and attached his balance in the books of his bankers, *Smith, Payne & Co.*, but the bankers had declined to give any information as to the amount of the balance.

This was a motion that Messrs. *Smith, Payne & Co.*, who were

FRY, J.
1882
MILLER
v.
HUDDLE-
STONE.

the bankers of Mr. *McMurray*, should pay into Court the amount of Mr. *McMurray's* balance in their hands.

Cookson, Q.C., and *A. J. Allen*, for the motion, relied on *Wilson* v. *Metcalfe* (1); *Seton* on Decrees (2).

Kekewich, Q.C., and *Latham*, for *Smith, Payne & Co.*, referred to *Crispin* v. *Cumano* (3) as shewing that the Court had no jurisdiction to make the order asked for, except with the consent of the bankers.

FRY, J.:—

I consider that I have jurisdiction to make the order asked for upon Messrs. *Smith, Payne & Co.* without any further proceedings. The case comes within the authority of *Wilson* v. *Metcalfe*, which shews that the order can properly be made upon service upon the third person, the bankers. I may observe that if I were to hold otherwise it would involve much greater expense and delay. The order will be that the bankers verify the balance of the Defendant *McMurray* by affidavit, unless they admit the amount at the bar.

[The amount of the balance was admitted at the bar, whereupon the following order was made:—]

Messrs. *Smith, Payne & Co.* admitting £2689 8*s* 6*d*. to be standing to the credit of *McMurray* in their books, order them to pay that sum into Court to the credit of this action, sequestration account. The Taxing Master to tax the costs of the sequestrators of and incidental to the sequestration, and to fix their remuneration, and to tax the costs of Messrs. *Smith, Payne & Co.*, and the amount so taxed and found due to be paid out of the fund so to be paid into Court.

Solicitors for Plaintiff: *Allen & Son.*
Solicitors for *Smith, Payne & Co.*: *Freshfields & Williams.*

(1) 1 Beav. 263. (2) Page 1578.
(3) Law Rep. 1 P. & M. 622.

C. W. C.

WADE *v.* WILSON.

FRY, J.

1882

Dec. 19.

[1882 W. 1698.]

Practice—Mortgage—Foreclosure—Order for Sale—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 25.

When at the trial of a foreclosure action the Plaintiff asks for a sale of the property, and the mortgagor does not appear, the Court will order an account of what is due to the Plaintiff to be first taken, and then that so much of the property be sold as will be sufficient to satisfy what is found due to the Plaintiff.

THIS was a foreclosure action. The Plaintiffs were equitable mortgagees by deposit of deeds. The Plaintiffs claimed an account of what was due to them for principal and interest on their mortgage; a declaration that the sum found due to them was a charge on the property comprised in the deeds; and that the charge might be enforced by foreclosure or sale. The Defendants were a second mortgagee and the mortgagor. The mortgagor did not appear to the writ; the second mortgagee appeared, but made default in pleading.

The Plaintiffs on the 27th of November, 1882, gave notice of motion for judgment, and the action was heard as a short cause on the 8th of December. The Defendants did not appear.

Sturges, for the Plaintiffs, asked for an immediate sale of the property.

FRY, J., gave judgment declaring the Plaintiffs entitled to the charge on the property which they claimed; directing an account of what was due to the Plaintiffs; and ordering that the mortgaged property, or a sufficient part of it, should be sold, and the amount due to the Plaintiffs paid to them out of the proceeds of sale.

The Registrar objected to draw up the judgment, on the ground that from the minutes as prepared it did not appear that the result of the account was to be certified before the sale could be made.

FRY, J.

1882

WADE v. WILSON.

Dec. 19. The case was now mentioned again to the Court.

Sturges, for the Plaintiffs:—

An immediate sale should be directed. In exercising its discretion the Court will consider what is most advantageous to the mortgagee: *York Union Banking Company* v. *Artley* (1); and now under sect. 25 of the *Conveyancing and Law of Property Act*, 1881, the Court has larger powers.

FRY, J.:—

I think the proper order will be to direct an account to be taken of what is due to the Plaintiffs on their security, and then that, on this amount being certified, the property, or so much of it as will be sufficient to satisfy the amount found due to the Plaintiffs, be sold. I think I ought only to order a sale of so much as will satisfy the Plaintiffs' security. Liberty to apply will be reserved. The minutes of the order must be altered in conformity with what I have said.

Solicitors: *Coopers.*

W. L. C.

FRY, J.

1882

Dec. 20.

ELLIOTT *v.* SMITH.

[1878 E. 98.]

Will—Construction—Gift over—"Death."

A testator left legacies to three persons, and if any of them died their share was to go to the others. One of the legatees and the testator died at the same instant:—

Held, that "death" must, according to the ordinary rule, mean death in the testator's lifetime, and that the legacy of the legatee so dying became part of the residue.

THE testator, *W. Elliott*, by his will dated the 19th of December, 1875, gave certain property to three persons in specified shares, and directed that if any of the three should die, the others should have their share. The residue was given to the same three persons equally.

(1) 11 Ch. D. 205.

One of the three legatees was drowned with the testator in the *Princess Alice* steam vessel, and there was nothing to shew which was the survivor.

The testator died leaving no next of kin.

This was an action for the administration of the estate, and the question arose whether the gift over to the two surviving legatees took effect.

Glasse, Q.C., and *Spence*, for the Plaintiff, one of the surviving legatees, submitted that the gift over took effect.

Cookson, Q.C., and *Owen*, for the other of the legatees:—

This is a new case.

In all the cases in which "dying" has been held to mean "dying before the testator," the reason for such interpretation was to prevent a gift once given from being limited to a life interest. "Dying" here should be interpreted "dying without taking a share," and then the gift to the others takes effect.

Cozens-Hardy, Q.C., and *Micklem*, for the trustees.

Stirling, for the Crown:—

"Dying" must refer to death before the testator: *O'Mahoney* v. *Burdett* (1). Therefore the legacy will sink into the residue, to one-third of which the Crown is entitled.

FRY, J.:—

The only question for me to determine in this case is what words am I to import into the will to explain the expression "in case one of the legatees dies." The unusual event has happened that the testator and one of the legatees have died in such a manner that there is nothing to shew which died first. If I ask myself what the testator meant by the word "die," I answer that he meant "die in my lifetime." The contingency of his dying at the same moment as the legatee never occurred to him. Lord *Hatherley* says, in *O'Mahoney* v. *Burdett* (2), that the only mode of construing such a gift is to understand the testator as saying "This contingency referred to the case of *A.'s* death during my

(1) Law Rep. 7 H. L. 388. (2) Law Rep. 7 H. L. 401.

FRY, J. 1882 ELLIOTT v. SMITH.

(the testator's) lifetime, in which case the legacy would remain undisposed of, and I therefore provide that in that event it shall go over to another."

It appears to me that by a long series of cases it has been decided that where there is a gift to *A.*, and if *A.* dies to *B.*, that means a gift to *B.* if *A.* dies before the testator. I must apply that rule to this case, and the consequence is that as the deceased legatee is not shewn to have died before the testator, the legacy falls into the residue.

Solicitors: *Belfrage & Middleton.*

C. W. C.

FRY, J. 1882 *Dec.* 20.

WILLOUGHBY OSBORNE *v.* HOLYOAKE.

[1882 W. 719a.]

Married Woman—Will—Power of Appointment.

A testatrix devising property by will by virtue of a power of appointment:—

Held, upon the construction of the will, to have made the property her own, so that on the death of the devisee in her lifetime the gift over in default of appointment did not take effect.

Hoare v. *Osborne* (1) disapproved.

MRS. *SMETHURST* made her will on the 15th of December, 1880, having at that date general powers of appointment over certain real and personal property which was subject to gifts over in default of appointment.

By her said will she desired that her will should operate upon all property in which she had any interest or over which she had any power of appointment or disposition; and after giving divers legacies she left and appointed all other property which she had power to dispose of between her three brothers, and she charged the property with her debts; and the will contained a direction that "all my jewellery not mentioned in this my will shall be sold, and the proceeds shall fall into my residuary estate," and she appointed her husband and a Mr. *Stogden* her executors.

One of the three brothers of Mrs. *Smethurst* died in her lifetime.

(1) 12 W. R. 661; 33 L. J. (Ch.) 586.

The question arose whether Mrs. *Smethurst* had by her will merely exercised her powers of appointment, in which case the share of this brother would go over as in default of appointment, or whether she had devised the property subject to the power as her own, in which case there was an intestacy.

The Plaintiff was interested in default of appointment.

Cozens-Hardy, Q.C., and *Dauney*, for the Plaintiff:—

The testatrix did not make the property part of her own estate: *In re Davies' Trusts* (1); *Hoare* v. *Osborne* (2).

Cookson, Q.C., and *Davenport*, for the executors:—

The fund is taken away from the donees in default of appointment: *In re Pinède's Settlement* (3).

Glasse, Q.C., and *E. Beaumont*, for the heir-at-law:—

The rule applies to realty as well as personalty: *In re Van Hagan* (4).

Stallard, *Watson*, *Godefroi*, and *Rawlins*, for other parties.

FRY, J.:—

In my opinion the testatrix in the present case must be deemed to have made the property in question part of her property. It appears that she was enabled to make the will under three powers of appointment, all of which were general powers. One was contained in her marriage settlement executed in 1875, one was conferred by her father's will over certain devised estates, and one was conferred by her father's will over a certain share of the residue of his general estate.

The question which I have to determine has been expressed in this manner: "The question in all cases of the class now before me is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for

(1) Law Rep. 13 Eq. 163.
(2) 12 W. R. 661; 33 L. J. (Ch.) 586.
(3) 12 Ch. D. 667.
(4) 16 Ch. D. 18.

FRY, J.
1882
WILLOUGHBY OSBORNE v. HOLYOAKE.

the limited purpose of giving effect to the particular disposition expressed." That is the mode in which the Vice-Chancellor of *Ireland* stated the questions (1), and it has been adopted by the Master of the Rolls in the case of *Pinède's Settlement* (2), to which I have been referred, and it undoubtedly expresses the true mode in which Courts have to determine cases of this description.

Now there are several indications, to my mind, of the intention to take this property out of the original instrument, and to make it in effect the property of the testatrix. One of the most material of these is the intention, which is obvious on the face of the whole of her will, to deal with her property as one mass. She charges the legacies and debts upon the entire property as a single body of property. She describes that property as "her residuary estate," and she leaves that property to be divided equally amongst three persons: one of those predeceased her, and hence the question which I have now to determine.

Let me observe a little more particularly on the structure of the will. The testatrix begins with declaring her desire that her will shall operate upon all property in which she has any interest or over which she has any power of appointment or disposition. The property in which she has interest, and the property over which she has power, are to be dealt with alike by this will. In the next place she appoints her husband and a Mr. *Stogden* to be her executors and trustees. The effect of that appears to me to be to vest the entirety of the personal estate over which she had the power of disposition, together with the property in which she had interest, in the same executors. Then she bequeaths certain legacies, and she then directs that her jewellery not previously mentioned in her will or any codicil thereto, should be sold, and the proceeds should fall into her residuary estate. She therefore has described the residue, which she afterwards deals with, as her residuary estate. I can hardly imagine a circumstance more indicative of the intention that that residue shall be treated as hers. And then, subsequently, she having declared that the property is subject to the charge for payment of her debts, funeral, and testamentary expenses, and foregoing legacies, she

(1) *In re De Lusi's Trusts*, 3 Ir. L. Rep. 232. (2) 12 Ch. D. 667, 672.

leaves and appoints all other property, both real and personal, of which she had power to dispose of, unto and to be equally divided between her three brothers. I think, therefore, there is to be found a clear intention that the residue shall be one, and that the residue shall be treated as hers. If I find that, it is sufficient to take it out of the operation of the previous instrument.

Some difficulty, no doubt, might be created by the case of *Hoare* v. *Osborne* (1), to which I have been referred, a decision of the learned Vice-Chancellor *Kindersley*. It appears to me that that case is not consistent with some of the subsequent decisions, and I can hardly help expressing my doubt as to the soundness of the reasoning in that case. That case proceeded upon this footing: a married woman cannot dispose of the fee simple of land; a married woman cannot dispose of personal estate unless it be settled to her separate use; a married woman can appoint both real and personal estate over which she has the power of appointment. If, therefore, argues the Vice-Chancellor, she makes it her own she can only dispose of it by virtue of her power of disposition incident to property, but she has no such power, therefore her disposition would fail. The result is that no expressed intention to make it her own can prevail over the expressed intention to dispose of it. If it is her own the disposition fails; if it is not it succeeds. That is the reasoning of the learned Vice-Chancellor. Therefore in the case of a married woman he declined to hold anything sufficient to make it her own property, because he held that that would defeat the entire object of the appointment. With great deference to the learned Judge, whose decisions I view with the highest respect, I am unable to follow that reasoning. It appears to me that the sound conclusion from a will of that description is this: that the appointment shall operate, but it shall operate as if the property had been her own. In that manner I give effect to both the expressed intentions, viz., the expression of intention that it shall be disposed of, and the expression of intention that it shall be treated as if it were her own. I therefore think that where, as in the present will, I find a declaration that the property is to be

(1) 12 W. R. 661; 33 L. J. (Ch.) 586.

FRY, J.
1882
WILLOUGHBY OSBORNE v. HOLYOAKE.

deemed hers, and a declaration of intention to exercise her power of appointment there is nothing to prevent the property being appointed as if it were her own. I hold therefore that the Plaintiff's case has failed.

Solicitors for Plaintiff: *Shoubridge & May.*

Solicitors for Defendants: *Clarke, Rawlins, & Co.*; *Nelson, Son, & Hastings.*

C. W. C.

DE GEER *v.* STONE.

KAY, J.

1882

July 24, 25, 26, 31; *Nov.* 15.

[1875 D. 11.]

Nationality—Alien—Right to inherit Land in England—Descendants born Abroad of natural-born British Subject—Status of British Subject—Ambassador—Officer in Military Service of Crown abroad—25 Edw. 3, stat. 1 [Revised Ed. Statutes, vol. i., p. 175]—7 Anne, c. 5 [Revised Ed. Statutes, vol ii., p. 195]—4 Geo. 2, c. 21, s. 1 [Revised Ed. Statutes, vol. ii., p. 369]—13 Geo. 3, c. 21, s. 1 [Revised Ed. Statutes, vol. iii. p. 19].

The *status* of natural-born British subjects, which, by the Acts 7 Anne, c. 5, 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, is conferred on children and grandchildren born abroad of natural-born British subjects, is a merely personal *status*, and is not by those Acts made transmissible to the descendants of the persons to whom that *status* is thereby given.

There is no foundation for the notion that by the common law of *England* the posterity of a natural-born British subject, though born abroad, must be treated as British subjects for ever.

The rule that the children born abroad of ambassadors in the service of the Crown of *England* abroad, are treated as natural-born British subjects, does not apply to the children born abroad of officers in the military service of the Crown in foreign parts.

FURTHER CONSIDERATION.

This suit was commenced in the Court of Chancery in January, 1875, to carry into effect the trusts of the will of *Jan Louis Mackay*, and to administer his real and personal estate.

The main question arising for decision on the present occasion was, whether the testator was an alien, and whether therefore his real estate belonged to the Crown.

Some questions also arose on the construction of the testator's will, viz., whether some of the gifts therein contained were void for remoteness, or whether they had otherwise failed. The questions of construction do not call for a report.

The testator was born at *Utrecht*, in *Holland*, in May, 1776. In 1807 he purchased some real estate in *England*, and made other purchases there up to 1824. From 1812 he resided in *England*. In October, 1826, he married an English lady in *England*. In October, 1830, he was residing at *Tournay*, in *Belgium*, where he continued to reside until his death. He was domiciled in *England* at the time of his death. His will was

KAY, J. 1882 De Geer v. Stone.

dated the 27th of October, 1835, and was executed at *Tournay*, where he died, on the 26th of September, 1840, without issue. His widow, who was tenant for life under the will, died in 1866. An administration decree was made on the 17th of April, 1875, by which various inquiries were directed to be made.

Other inquiries were afterwards added, and on the 7th of June, 1882, the Chief Clerk made his certificate.

The result of his finding was as follows:

Æneas Mackay, the great grandfather of the testator, was a natural-born subject of *Great Britain*, being the second son of *John Mackay*, Lord *Reay* in the peerage of *Scotland*. This *Æneas Mackay* was the colonel and proprietor of a regiment of British troops, known as *Mackay's Regiment*, which in or about the year 1691 was dispatched by King *William* III. to take part in the war which between that date and the year 1697 was continuously raging between *England* and *Holland* and their allies (among whom were the States-General of the *United Provinces*) on the one side, and *France* on the other side. *Æneas Mackay*, while he was thus abroad with his regiment, was married in *Holland* to a Dutch lady. Of this marriage there was a son *Daniel Mackay* (A), the grandfather of the testator, who was born in *Holland* in September, 1696. *Daniel Mackay* (A), in September, 1732, was married in *Holland* to a Dutch lady, and he died in *Holland* in May, 1745. Of this marriage there was a son *Daniel Mackay* (B), the father of the testator, who was born in *Holland*, in May, 1744, and died in September, 1782. *Daniel Mackay* (B) in November, 1772, was married in *Holland* to a Dutch lady, and his son, the testator, was, as already stated, born at *Utrecht*, in May, 1776.

In the year 1696 the regiment of *Æneas Mackay* (the great grandfather), was in the service of King *William* III. and Queen *Mary*, and on the establishment of the English or Scotch army, and was paid by the paymaster of the English or Scotch forces, and the commission of *Æneas Mackay* was granted by and in the names of King *William* and Queen *Mary* on the 1st of August, 1692. There was, however, no trace of the regiment having been on the establishment of the English or Scotch army subsequently to 1697. After that date the regiment remained in *Holland*, and was, apparently, in the pay of the States-General. *Daniel*

Mackay (A) lived abroad and ultimately became an officer in this regiment.

The regiment visited *England* in 1685, in 1688, and for the last time in 1697. In 1756 it was enacted by the 29 Geo. 2, c. 17, that if any of his then Majesty's subjects should from and after the 24th of June, 1756, accept commissions in the Scotch Brigade, of which this regiment was part, he should subscribe the oaths of allegiance and abjuration. *Daniel Mackey* (B), the father of the testator, did so, upon being appointed an ensign in one of the regiments of the Scotch Brigade. In 1793, some officers of the Scotch Brigade, who had been dismissed from the Dutch service because they declined to take the oath of allegiance to the States General, war having then broken out between *Great Britain* and *Holland*, were put upon the muster-roll of the 94th British regiment. There was some evidence, referred to by the Chief Clerk, which tended to shew, that, although the Scotch Brigade had ceased after 1697 to be on the establishment of the English army, relations of a peculiar character continued for many years afterwards to subsist between it and the Sovereign of *Great Britain*.

The action now came on for further consideration (1).

(1) The Parliament Roll, 17th Ed. 3 (1343) p. 139, contains the following statement :—

"*Pur ce q̃ avant ces heures grante Doute & Difficultee ont este entre les Grantz de cest Roialme & les Communes, aussi bien Gentz de Lei come autres, si les enfantz qi sont nees es pties d'outre miere deveroient porter Heritage apres le decesse de lour Auncestres en Engleterre, p cause q̃ certeyne Lei n'ad pas este sur ce ordeignee cea en arere, si fu demandez par . . . . . L'Ercevesq̃ de Cantirbirs a touz les Prelatz & Grantz presentz en ce Parlement, si les enfantz ñre Seign' le Roi qi feussent neez es pties de dela serroient enheritez en Engleterre? Lesqueux Prelatz & Grantz, chescun a par lui examinez, donerent lour Respons d'une acorde, Q'il n'y ad nulle manere de Doute, q̃ les Enfantz ñre Seign' le Roi queu pt q'ils soient neez par decea la miere ou par dela, porteront l'Eritage de lour Auncestres. Mes quant as Enfantz des autres, il est avis as ditz Prelatz & Grantz, & as Gentz de Lei illoeȝs presentz, Qe pur divers Doutes & Difficultees q̃ purront avenir de prover q̃ tieux soient verrois Heirs si debatz ou empeschementz soient mys en lour Heritages, il covendroit molt penser avant q̃ certeyne Lei sur ce soit ordeignee. Si fu ceste matiere autre foitz recitee en la presence ñre Seign' le Roi & des ditz Prelatz & Grantz, & aussint des cõmunes et p eux touz uniement acordez & assentiez come desus, qe des Enfantz de ñre Seign' le Roi il n'y ad Doute ne Difficultee q'ils ne serront enheritez, queu pte q'ils soient neez. Et endroit des autres Enfantz,*

KAY, J.

1882

DE GEER v. STONE.

Glasse, Q.C., and *R. Campbell*, for the Plaintiffs:—

It is found by the certificate that the Plaintiffs are aliens, and therefore they cannot take any part of the testator's real estate.

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accordez est en ce Parlement, q'ils soient aussint enheritez queu part q'ils soient neez en le service le Roi. Mes pur ce q̃ le Parlement est ore a deptir & ceste busoigne demand grant avisement & bone deliberation coment ele se purra mieltz faire, & plus surement; pur ouster tote manere d'Empeschementz si est acordez, q̃ la fesance de l'Estatut en ce cas demurege tan q̃ au prochein Parlement, issint q̃ entre cy & adonq̃s chescun em pense coment certeyne Lei ent purra mieltz estre ordeignee. Et sur ce sont les Justices & autre Sages chargez par le Roi et par les Grantz."

By the Act 25 Ed. 3, stat. 1 (1350) after a recital that "some people be in doubt if the children born in the parts beyond the seas, out of the ligeance of *England*, should be able to demand any inheritance within the same ligeance or not, whereof a petition was put in the Parliament late holden at *Westminster*, the 17th year of the reign of our lord the King that now is, and was not at the same time wholly assented; our lord the King willing that all doubts and ambiguities should be put away, and the law in this case declared and put in a certainty, hath charged the said prelates, earls, barons, and other wise men of his council, assembled in this Parliament, to deliberate upon this point; all which of one assent have said, that the law of the Crown of *England* is, and always hath been such, that the children of the Kings of *England*, in whatsoever parts they be born, in *England* or elsewhere, be able and ought to bear the inheritance after the death of their ancestors; which law our said lord the King, the said prelates, earls, barons, and other great men, and all the Commons assembled in this Parliament, do approve and affirm for ever. And in the right of other children born out of the ligeance of *England* in the time of our lord the King, they be of one mind accorded, that *Henry*, son of *John de Beaumond*, *Elizabeth*, daughter of *Guy de Bryan*, and *Giles*, son of *Ralph Dawbeny*, and other which the king will name, which were born beyond the sea, out of the ligeance of *England*, shall be from henceforth able to have and enjoy their inheritance after the death of their ancestors, in all parts within the ligeance of *England*, as well as those that should be born within the same ligeance. And that all children inheritors, which from henceforth shall be born without the ligeance of the king, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the King of *England*, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligeance, as the other inheritors aforesaid in time to come; so always, that the mothers of such children do pass the sea by the license and wills of their husbands."

By the Act 7 Anne c. 5 (1708) it is enacted that "the children of all natural-born subjects born out of the ligeance of her Majesty, her heires and successors, shall be deemed, adjudged, and taken to be natural-born subjects of this kingdom to all intents, constructions, and purposes whatsoever."

By the Act 4 Geo. 2, c. 21 (1730) sect. 1 (passed to explain the Act of Anne) it is enacted that "all children born out of the ligeance of the Crown

If the costs of the action are paid rateably out of the real and personal estate, the Plaintiffs have no interest in the question whether the testator was an alien. Otherwise the Plaintiffs will contend that he was not an alien.

Sir *H. James*, A.G., Sir *F. Herschell*, S.G., and *Stirling*, for the Crown, said that they should contend that the testator was an alien, and consequently that the Crown was entitled to the real estate. But they should not object to any order which the Court might make as to costs, provided that the Crown was not to pay any.

Westlake, Q.C., and *F. Pollock*, for Lord *Reay*, and other persons who would be entitled to the real estate if the testator was a natural-born British subject:—

The testator's grandfather *Daniel* (A) was a natural-born British subject by the Common Law, because when he was born in *Holland* his father *Æneas* was in the military service of the Crown: Parliament Roll, 17 Edw. 3, p. 139; 25 Edw. 3, stat. 1, which are really only declaratory of the Common Law. And, if *Daniel* (A) be a natural-born subject by the Common Law, then by virtue of the statute of Geo. 3, the testator, who is his grandson, has also the *status* of a natural-born subject.

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of *England* or of *Great Britain*, or which shall hereafter be born out of such ligeance, whose fathers were or shall be natural-born subjects of the Crown of *England* or of *Great Britain*, at the time of the birth of such children respectively, shall and may, by virtue of the said recited clause in the said Act of the 7th year of the reign of her said late Majesty and of this present Act, be adjudged and taken to be, and all such children are hereby declared to be natural-born subjects of the Crown of *Great Britain* to all intents, constructions, and purposes whatsoever."

By the Act 13 Geo. 3, c. 21 (1773) sect. 1, it is enacted "that all persons born, or who hereafter shall be born, out of the ligeance of the Crown of *England* or of *Great Britain*, whose fathers were or shall be, by virtue of a statute made in the 4th year of King *George* the Second to explain a clause in an Act made in the 7th year of the reign of Her Majesty Queen *Anne*, for naturalizing foreign Protestants, which relates to the natural-born subjects of the Crown of *England*, or of *Great Britain*, intituled to all the rights and privileges of natural-born subjects of the Crown of *England* or of *Great Britain*, shall and may be adjudged and taken to be, and are hereby declared and enacted to be, natural-born subjects of the Crown of *Great Britain*, to all intents, constructions, and purposes whatsoever, as if he and they had been and were born in this kingdom."

KAY, J.
1882
DE GEER
v.
STONE.

In *Calvin's Case* (1) it is said that by the Common Law the children of an ambassador of the King in foreign nations, though born out of the King's dominions, are natural-born subjects. He says also that the wife must be an Englishwoman, but the statute of *Edward* III. does not say so, and it has been held in other cases that this condition does not exist: *Bacon* v. *Bacon* (2); *Doe* v. *Jones* (3). But, in truth, by the Common Law children of natural-born British subjects are themselves natural-born subjects, and can transmit that *status* to their posterity without limit. There is a *dictum* of *Hussey*, C.J., to this effect: Year Book *Richard* III. (4). See also the speech of Lord *Bacon*, *Cobbett's* State Trials (5); *Count Wall's Case* (6). At any rate, the effect of the statutes of *Anne* and *George* III. is to give the *status* of natural-born subjects to the children and grandchildren born abroad of natural-born subjects, and they can transmit that *status* to their remotest posterity, until they cast off their allegiance to the British Crown. It was so held in the *Athlone Peerage Case* in *Ireland* in 1795; *Westlake's* Private International Law (7); *Lodge's* Peerage of *Ireland* by *Archdall* (8).

Also in the present case the officers of the Scotch brigade had a special *status* as British subjects, and thus the testator's grandfather was a British subject. And, notwithstanding the decision in *Sharp* v. *St. Sauveur* (9) the *Naturalization Act* 1870 (33 & 34 Vict. c. 14), enables the persons entitled to the real estate of the testator to inherit, even if they are aliens. Sect. 2 of that Act bars the right of the Crown to land in any case in which it had not acquired a right in possession before the passing of the Act. In *Sharp* v. *St. Sauveur* the Crown was in possession before the passing of the Act.

Everitt, Q.C., and *Byrne*, for the next of kin of the testator.

Cookson, Q.C., and *Kelke*; *Cozens-Hardy*, Q.C., and *Galton*; *J. Pearson*, Q.C., and *Ryland*; for other parties.

(1) 7 Rep. 18 a.
(2) Cro. Car. 601.
(3) 4 T. R. 300.
(4) Mich. Term, year 1, p. 4, pl. 7.
(5) Vol. ii. p. 585.
(6) 3 Knapp, P. C. 13.
(7) 1st Ed. p. 13; 2nd ed. pp. 286–289.
(8) Vol. ii. p. 153.
(9) Law Rep. 7 Ch. 343.

R. F. Norton, for trustees.

Sir *H. James*, A.G., Sir *F. Herschell*, S.G., and *Stirling*, for the Crown:—

It is not true that, either by the Common Law or by virtue of the statute of Edward III., a child born abroad of a natural-born British subject has the *status* of a natural-born subject so as to be able to transmit it to his descendants for ever. Though the Crown is willing to allow the persons who claim the testator's real estate to take it in the present case, it is important to shew that the doctrine put forward is not true, for it would apply to the succession to peerages and to the right to vote in elections of members of Parliament. The Parliament Roll of 17 Edw. 3 shews only that a petition was presented and that no decision on it was then given. It certainly could not declare the Common Law. The answer to the petition is to be found in the statute of 25 Edw. 3. That statute is an enactment, not a mere declaration of the law: *Cockburn* on Nationality (1). If the law had been as is supposed the statute of Anne and Geo. 3 would have been wholly unnecessary. If the latter Act is a declaration of the law, why should it stop at grandchildren? Indeed the Act of Geo. 3 must have been unmeaning if the Act of Anne has the effect contended for. *Calvin's Case* (2) shews that the mother of the child born abroad must be an Englishwoman. And, if this is not a necessary condition, it is only a merchant trading in a foreign country who is exempt from it. An ambassador is not: *Jenkins* (Cases 1st Century) (3). The *Athlone Peerage Case* is of no authority; the point said to have been there decided does not appear to have been argued: *Craw* v. *Ramsey* (4); *Bacon* v. *Bacon* (5). As to the Act of 1870, if the testator was an alien, the right of the Crown fell into possession when he died in 1840.

Westlake, in reply:—

The principle of the rule, which is admitted to apply to the children of an ambassador born abroad, applies equally to children of military servants of the Crown.

(1) Pages 7, 9, 94.
(2) 7 Rep. 18 a.
(3) 3rd Ed. Case 2.
(4) Vaughan, 274, 281.
(5) Cro. Car. 601.

KAY, J.
1882
DE GEER
v.
STONE.

Glasse, in reply, on the question of remoteness.

Nov. 15. KAY, J. (after stating the facts) continued:—

Reliance is placed by those who contend that *Daniel Mackay* (A), the testator's grandfather, was a British subject on the Parliament Roll, 17 Edw. 3, in the year 1343. I need not read the words, but the effect is this. It recites that great doubt and difficulty had arisen between the nobles of the realm and the commons and also the gentlemen of the law, as well as others, whether children who should be born beyond the sea could inherit after the decease of their ancestors in *England*, because that no certain law had been passed upon this matter, and it seems to have been demanded by the Archbishop of *Canterbury*, the prelates and the grandees of the realm in Parliament, whether the children of our lord the King who should be born in parts beyond the sea could inherit in *England*. Then it states that the prelates and nobles of the realm, being severally examined, gave their reply with one accord, that there was no manner of doubt that the children of our lord the King, in whatsoever part they might be born, whether within the sea or beyond, would bear the inheritance of their ancestors, but as to the children of other persons it is the opinion of the same prelates and nobles, and also the gentlemen of the law then present, that, in consequence of divers doubts and difficulties which might arise concerning this matter, it would be better that much consideration should be taken before a certain law on this subject should be ordained. Then it states that it was unanimously agreed as to the children of our lord the King there was no manner of doubt that they could inherit, wherever they might be born, and as to other children it is allowed in this Parliament, perhaps I had better read the original words here: "*Et endroit des autres enfantz, acordez est en ce Parlement, qu'ils soient aussint enheritez queu part qu'ils soient neez en le service le Roi.*"

It is not alleged that this has the force of an Act of Parliament, but it is cited as an authoritative statement of the law which, from its antiquity, is worthy of respect. But it must be observed that the statement, though emphatic as to the children of the King of *Great Britain*, is by no means so as to the children born of persons in the service of the King. The great doubt and difficulty which

are said to have existed must be as to these latter, because it is stated that there is no manner of doubt as to the children of the King born abroad. But the whole subject was, according to that Parliament roll, postponed to be considered in a future Parliament. [His Lordship referred to the provisions of 25 Edw. 3, stat. 1, and continued:—] From that it would seem that *primâ facie* the mother must be an Englishwoman. In *Calvin's Case* (1) it is stated that there are three incidents to a subject born—"(1.) That the parents be under the actual obedience of the King; (2.) That the place of his birth be within the King's dominion; and (3.) The time of his birth." And, with respect to the place, it is stated, "The place is observable, but so as many times ligeance or obedience without any place within the King's dominions may make a subject born, but any place within the King's dominions may make a subject born, but any place within the King's dominions without obedience can never produce a natural subject. And therefore if any of the King's ambassadors in foreign nations have children there of their wives, being Englishwomen, by the common laws of England they are natural-born subjects, and yet they are born out of the King's dominions." Lord *Coke* therefore states it to be a condition, even in the case of an ambassador, that his wife should be an Englishwoman.

But in *Bacon* v. *Bacon* (2), which was decided in 1641, the daughter of a merchant who resided abroad for merchandizing was held entitled to inherit land in *England*, and it is stated "it is not material although his wife be an alien, for she is, as *Berkley* said, *sub potestate viri* and *quasi* under the allegiance of our King."

It is to be observed that in *Bacon* v. *Bacon* the wife was actually an Englishwoman, so that this was *obiter dictum*. In *Doe* v. *Jones* (3), Lord *Kenyon*, C.J., considers the language of the Act of 25 Edw. 3, and the authority of these cases, and says, "If we were now called upon for the first time to put a construction on the words of this statute, I should not think that they ought to be extended further than the natural import of the words, but that, in order to be entitled to the privileges and

(1) 7 Rep. 18 a. (2) Cro. Car. 601.
(3) 4 T. R. 308.

KAY, J.
1882
DE GEER
v.
STONE.

benefits of that Act, the children must be born of natural-born parents, both father and mother, within the faith and ligeance of the King." And, referring to the contest of authorities, he states it as his view that the opinion of Lord *Hale* in *Collingwood* v. *Pace* (1) would overturn the decisions to the contrary.

Lord *Hale's* language in that case is (2), "The statute *de natis ultra mare*, 25 Edw. 3, declares that the issue born beyond sea of an Englishman upon an Englishwoman shall be a denizen, yet the construction hath been, though an English merchant marries a foreigner, and hath issue by her beyond the sea, that issue is a natural-born subject," and he refers to *Bacon's Case* (3) and *Calvin's Case* (4), which I have cited as authorities. I must therefore take it to be decided that it is not necessary that the wife of an Englishman, resident abroad, should be an Englishwoman, but that under the statute the issue may be capable of inheriting, although the mother was a foreigner. Accordingly, *Daniel* (A), being son of *Æneas*, a natural-born subject, though by a mother who was a Dutch lady, was capable of inheriting, and must be considered by force of the statute a natural-born subject of *Great Britain*. *Daniel* (A) lived to 1745. [His Lordship referred to the provisions of the Acts of 7 Anne, 4 Geo. 2, and 13 Geo. 3, and continued:—] *Daniel* (A) being entitled by the Act of Anne to the *status* of a natural-born subject, his son *Daniel* (B), being the son of a father who was made a subject by the statute of Anne, was also entitled to the rights of a natural-born subject under the Act of *George* III. Lord Chief Justice *Cockburn*, in his Treatise on Nationality (5), refers to these statutes, and considers them as not being declaratory of the common law, but substantive enactments. He deals also at page 94 with an argument which has been addressed to the Court in this case—that the posterity of a natural-born British subject, though born abroad, are by the Common Law to be treated as British subjects for ever. For this the Lord Chief Justice says there is no foundation, and, indeed, if that were the common law, such legislation as I have referred to, giving the *status* of a British

(1) 1 Vent. 413.
(2) Ibid. 427.
(3) Cro. Car. 601.
(4) 7 Rep. 18 a.
(5) Pages 7–10.

subject first to children born abroad, and then to the children of fathers so born, would have been unnecessary, and as a declaration of the law would have been insufficient and inaccurate. The *Earl of Athlone's Case*, which has been cited, is not sufficient to overrule these considerations. Mr. *Westlake*, in the second edition of his valuable book (1), treats it as of doubtful authority. I must take the law to be that the grandchild born abroad, whose father was also born abroad, being respectively grandchild and child of a man who was by the common law a natural-born British subject, would be himself a natural-born British subject, but that his children, if born abroad, would be aliens. By this law *Daniel* (B), the grandson of *Æneas*, would be a natural-born British subject, but the testator, who was the son of *Daniel* (B), would be an alien.

However, it is argued that the position of the Scotch Brigade would, independently of these statutes, give the *status* of a natural-born subject to the officers serving in it and their children. Of the testator's ancestors, *Æneas* the father of *Daniel* (A), was the only one who was an officer in that brigade during the time that it was, strictly speaking, in the service of the Crown of *England*. *Æneas* is the last of the testator's ancestors who was by the common law a natural-born British subject, and the position of the Scotch Brigade does not save the testator from being treated as an alien. *Daniel* (B), the father of the testator, took the oaths of allegiance and abjuration in conformity with the statute 29 Geo. 2. But this was proper and necessary, as he was a natural-born British subject by statute, though without the power of transmitting that *status* to his children born abroad. It has been argued as though this act on his part amounted to naturalization or gave him somehow the *status* of a British subject at common law. I do not think it had such an effect. The Scotch Brigade seems to have been in an anomalous position after 1697, when it ceased to be on the establishment of the British army. It was officered to some extent by British subjects. But the statute of *George* II. requiring any British subject to take the oaths of allegiance and abjuration before accepting service in it, and the subsequent dismissal from it of all

(1) Page 289.

KAY, J.
1882
DE GEER
v.
STONE.

British officers who refused to swear allegiance to the States-General, prove that it was no longer part of the British army, and I cannot hold that service in it after 1697 could give the *status* of a British subject by the common law. Even if *Daniel* (A) or *Daniel* (B) had been in the service of the British Crown abroad, I cannot find any authority for saying that this would have given them the *status* of natural-born British subjects by the common law. In a note to page 9 of the 1st edition of Mr. *Westlake's* Treatise on Private International Law, the reason that ambassadors' children were treated as natural-born subjects is said to be that an "Ambassador's house is reputed part of his Sovereign's realm," and the learned author continues, "The 25 Edw. 3, stat. 1, shews that the same exception was not made in favour of children whose parents served the King abroad in any other capacity." The case of ambassadors' children is also treated as an exception in Lord Chief Justice *Cockburn's* Treatise on Nationality (1), and for the same reason. This reason does not apply to a child born abroad to a soldier in the British service abroad. Such a child might be a natural-born subject under the provisions of the statutes I have mentioned, but not by the common law. *Sharp* v. *St. Sauveur* (2) decides that the *Naturalization Act*, 1870, is not retrospective. The consequence is that the real estate of the testator belongs to the Crown.

I understand that the Attorney-General does not object to the proposed apportionment of costs.

Solicitors for the Crown: *Hare & Co.*

Solicitors for all other parties: *Clarke, Woodcock, & Ryland*, agents for *Stone, King, & King, Bath.*

(1) Page 7. (2) Law Rep. 7 Ch. 343.

W. L. C.

KAY, J.

1882

Nov. 17.

In re PUMFREY, DECEASED.

THE WORCESTER CITY AND COUNTY BANKING COMPANY *v.* BLICK.

[1881 P. 2299.]

Trustee—Settlement—Power to purchase Land—Advance by Trustee of Part of Purchase-money—Lien.

Under a marriage settlement the trustees were empowered at the request of the husband and wife to invest the trust fund in the purchase of real estate, and to re-sell the same. In exercise of this power the trustees, at the request of the husband and wife, bought certain real estate at a price which exceeded the whole of the trust fund, the husband promising to provide the balance out of his own moneys. The husband could not fulfil his promise, and *C. P.*, one of the trustees, at the request of the husband and wife, borrowed the sum necessary to complete the purchase from a bank, and deposited with them the title deeds of the estate.

C. P. died, and the husband was unable to repay the loan.

In an action brought by the bank for an account and the realization of their security, and for administration of *C. P.'s* estate:—

Held, that the trust estate was entitled to a first charge upon the real estate purchased for the full amount of the trust fund; that subject to such charge the estate of *C. P.* was entitled to be indemnified out of such real estate for the amount borrowed by him, and actually invested in or about the purchase, and to enforce such indemnity by sale of such real estate without the consent of the husband and wife; the bank being entitled to stand in the place of *C. P.* as against the trust estate for the amount due to them.

THIS was an action by the *Worcester City and County Banking Company* to have an account taken of what was due to them for principal and interest upon certain securities, and to obtain payment from the Defendants, or one of them, and, in default of payment, sale or foreclosure; and, if necessary, to have the real and personal estate of *Charles Pumfrey*, deceased, administered by the Court.

By an indenture dated the 3rd of January, 1863, being a settlement made on the marriage of *Walter Sandell Mappin* and *Mary Ann Mappin*, then *Mary Ann Pumfrey*, certain personal estate of the said *M. A. Mappin* was settled as to the annual income thereof upon trust for her during her life for her separate use, without

KAY, J.
1882
In re PUMFREY, DECEASED.
WORCESTER CITY AND COUNTY BANKING COMPANY v. BLICK.

power of anticipation, and after her death upon trust for *Walter Sandell Mappin* if he should survive her during his life, or until he should become bankrupt or attempt to alienate the same, and as to the capital of the trust estate, after the death of *Mary Ann Pumfrey*, and failure of the trust for *Walter Sandell Mappin*, then upon the trusts in favour of her children and other persons therein mentioned. And in the settlement was contained a power for the trustees thereof during the lives of *Mary Ann Pumfrey* and *Walter Sandell Mappin* and the life of the survivor of them, upon his or her request in writing, to invest all or any part of the trust estate in the purchase of freehold, leasehold, or copyhold hereditaments in *England* or *Wales*, and to re-sell the same hereditaments, or any part thereof, and stand possessed of the net moneys to arise from any such sale upon the same trusts as the money laid out in the purchase of such hereditaments would have been subject to if the same had not been so laid out, and it was thereby declared that in the meantime the rents and profits of the said hereditaments should be paid to the person for the time being entitled to the income of the said trust estate.

In the year 1876, when *John Hillman* and *Charles Pumfrey* (both since deceased), and the Defendant *John Hillman Pumfrey* were the trustees of the settlement, *W. S. Mappin* and his wife being desirous of buying a freehold messuage called *Riverside* at *Twickenham*, requested the trustees in exercise of the power contained in the settlement, to invest the trust estate in the purchase thereof.

The price of the messuage was £3050, and the trust estate was of the value of £2701 only. The trust estate being thus insufficient to provide the whole of the purchase-money, it appeared from the evidence to have been at first intended that *Walter Sandell Mappin* should advance the difference between the value of the trust estate and the amount of the purchase-money out of his own moneys, and it appeared that upon the faith of this understanding *Charles Pumfrey* signed a contract for the purchase of the property with a view to its being conveyed to the trustees upon the trusts of the settlement. *W. S. Mappin*, however, subsequently wrote to say that he was not able to provide the balance of the purchase-money. A suggestion was then made that the

trustee *Charles Pumfrey* (who was the uncle of *W. S. Mappin*) should advance the money; and on the 7th of July, 1876, before the purchase was completed, the solicitors of *W. S. Mappin* wrote as follows: "The only remedy for the difficulty so far as we see is for the trustees to borrow a sufficient sum to enable them to complete the purchase." These suggestions were carried out in the following manner: *Charles Pumfrey*, by the desire of Mr. and Mrs. *Mappin* and with the concurrence of his co-trustees, on the 14th of August, 1876, borrowed from the Plaintiffs, the *Worcester Banking Company*, the sum of £449, to enable the purchase to be completed. At the time the money was borrowed *Charles Pumfrey* signed a memorandum in these terms: "I the undersigned *Charles Pumfrey*, trustee of Mrs. *Mary Ann Mappin*, acknowledge to have received of the *Worcester City and County Banking Company* the sum of £449, and I undertake to place in their hands as further security the several title deeds relating to a freehold dwelling-house and hereditaments called *Riverside*, at *Cambridge Park, Twickenham*, and authorize them to hold the same until payment of the said sum and interest." The whole of the trust estate and of the £449 thus borrowed was applied in completing the purchase and paying the costs, and shortly after the date of the memorandum the property was conveyed to the trustees in fee.

On the 25th of September, 1876, *Charles Pumfrey* deposited the conveyance and title deeds of the property with the Plaintiffs, and at the same time executed and delivered to them an instrument under his hand and seal, which stated that as one of the trustees of the settlement he had deposited these title-deeds with the Plaintiffs for securing to them the payment of all sums of money in which he was or might from time to time be indebted to them, either alone or with any other person, and that he thereby assigned the premises to them and their successors and assigns for all his estate and interest therein by way of mortgage for securing the sums aforesaid with power of sale, and agreed to execute an effectual mortgage when required. *Charles Pumfrey* died on the 26th of December, 1877, and the Defendant *Blick* was his legal personal representative and devisee of trust estates. *W. S. Mappin* having made only one payment to the Plaintiffs of

KAY, J.
1882
In re PUMFREY, DECEASED.
WORCESTER CITY AND COUNTY BANKING COMPANY *v.* BLICK.

interest upon the loan of £449, and the principal with large arrears of interest being due, the Plaintiffs brought this action against *John Blick*, *John Hillman Pumfrey* (the surviving trustee), and *Walter Sandell Mappin*, alleging that they had a lien and charge upon the purchased property for the principal and interest of their loan in priority to the trusts of the settlement, and that if and so far as they should not recover principal, interest, and costs, they were entitled to recover the same by sale or foreclosure of the premises, and they claimed an account, payment from the Defendants or one of them, and in default a sale or foreclosure, and if and so far as necessary administration of *Pumfrey's* estate.

P. V. Smith, for the Plaintiffs.

Hastings, Q.C., and *Maidlow*, for the Defendant *Blick*:—

There is no doubt that *Charles Pumfrey* was in his lifetime, as between himself and the bank, and that his estate is now, liable to the bank for the amount he borrowed. Nor that such estate ought, under the circumstances, to be indemnified by *W. S. Mappin*, who appears to have induced *Pumfrey* to enter into the contract by promising himself to provide the balance of the purchase-money. *W. S. Mappin*, however, is not, it seems, able to give such indemnity, accordingly, as *Pumfrey* borrowed the money and invested it in a *bonâ fide* manner, under a power in the settlement, for the convenience of the trust, and without any intention of benefiting himself, his estate is entitled to be indemnified out of the trust estate, and to have a lien on the purchased property for the amount so borrowed and invested.

Warrington, for the other Defendants:—

Admitting that *W. S. Mappin* ought to, but cannot, indemnify *Pumfrey's* estate, I contend that such estate is not entitled to any lien or charge upon the purchased property. For where a trustee mixes his own moneys with the trust fund so as to form one general mass, the *cestuis que trust* are entitled to the whole. So here the whole of the purchased property, and not only some particular part of it, belongs to the *cestuis que trust*. But if the trustee has a lien or charge of any kind, it is one which cannot

be enforced until the trust for sale has again arisen, and the property is once more turned into money. For when he advanced the money he was fully cognizant of the nature of the trusts he had to perform, and his lien or charge must be subject to that of the trust estate and to the terms of the trust. In this case, no sale can be made except at the request of the husband and wife or the survivor, and the Court could not order a sale against the wishes of the *cestuis que trust*. He referred to *Leedham* v. *Chawner* (1) and *Darke* v. *Williamson* (2).

P. V. Smith, in reply :—

The husband and wife in requesting the trustee to execute a mortgage to the bank assented by anticipation to a sale to give effect to that mortgage.

KAY, J. :—

This case certainly raises rather a curious question. It appears, and it is not all disputed, that the first person liable to indemnify *Charles Pumfrey* is *Walter Sandell Mappin* ; but it is quite clear to me that he will not be able to do so ; and that raises the question whether *Charles Pumfrey*, who obtained this loan, and who is undoubtedly liable to the bank for the loan, has any right to be indemnified out of the trust estate. If he has, it is not contested that, under those circumstances of attempted mortgage he has given to the bank at least whatever claim he is entitled to as against the trust estate.

First, I must take it upon the pleadings that the bank knew they were dealing with a trustee, and therefore I cannot for a moment say that they have any right as legal mortgagees without notice under this document, which was in fact a deed-poll, and which purported to grant and convey the estate to them. It seems to me that in any possible view of the case, the first right against this property is a right of the trust estate to have the trust fund completely provided for. That is a paramount right ; and then I must treat the bank as having a right to stand in the place of *Pumfrey* against the trust estate, and to have transferred to them whatever right of indemnity *Pumfrey* may have out of

(1) 4 K. & J. 458. (2) 25 Beav. 622.

KAY, J.
1882
In re PUMFREY, DECEASED.
WORCESTER CITY AND COUNTY BANKING COMPANY *v.* BLICK.

the purchased estate for the moneys which, under these circumstances, he advanced.

Now *primâ facie*, according to the well known case of the *German Mining Company* (1), a trustee who *bonâ fide*, without any intention of benefiting himself, advances money of his own for the purposes of the trust estate, has a right to be indemnified. Now let me see whether that was so or not in this case. There is no suggestion that *Pumfrey* intended to benefit himself in any way. The conveyance of the estate was made to the three trustees. *Pumfrey* has never made any sort of claim on his own behalf; he does not now claim to have any profit or advantage of this purchase. His utmost claim is indemnity. It is plain, I think, from a letter I have read, that he advanced this money for the purpose of completing a purchase which was within the trust, a trust which had properly arisen at the request of the husband and wife, and which purchase could not, I conclude, have been made at all (the property being a small household property) unless the money to make up the amount of £3050 had been provided somehow or other. Therefore it appears to me that this is simply a case of a trustee who, without the slightest chance of benefit to himself, for the convenience of his *cestuis que trust*, advanced a sum of money of his own to complete a purchase which otherwise was entirely within the trust, and within his power to make. Therefore, quite apart from all these transactions of attempted mortgage (which I treat as being no more than an assignment of such equity as he might have, to the bank), it seems to me that he has *primâ facie* an equity to be indemnified in respect of this advance. But then a suggestion was made that the rule which is so often applied, and sometimes very harshly applied, against trustees, that where a trustee mixes his own money with trust funds the whole heap resulting from that admixture belongs to the trust, must be applied in this case. But on looking at Mr. *Lewin's* book on Trusts (2), I find that which I think we all understand has always been the rule, that where an estate is bought partly with trust money and partly with other money, the *cestui que trust* has never been held entitled to the whole estate, but all that he has been entitled to is a lien upon the estate for

(1) 4 D. M. & G. 19. (2) 7th Ed. p. 763.

the full amount of the trust fund. Mr. *Lewin's* words are these: "We may here put the case of trust money mixed in the same heap with the trustee's money. It may be said, that the trust money has, like water, run into the general mass, and become amalgamated, and therefore the *cestui que trust* has no lien. But clearly this cannot be maintained, for suppose a trustee partly with his own money and partly out of the trust fund, to have purchased an estate. It cannot be predicated of any particular part of the estate that it was purchased with the *cestui que trust's* money, and yet the *cestui que trust* has a lien upon the whole for the amount that was misemployed." That is the ordinary case where the equity arising from that admixture has been enforced against the trustee. But I find in the case of *Mathias* v. *Mathias* (1) that a sole trustee who bought an estate with trust money, but expended money of his own to the amount of £820 in paying costs, which expenditure with the purchase-money exceeded the amount of the trust fund invested in the purchase of the estate by a sum of £593, was declared entitled by Vice-Chancellor *Stuart* to have a charge upon the purchased estate for that excess; and unless the doctrine of admixture of trust moneys with the trustee's own money would prevent the trustee claiming any right of indemnity, that seems to me to be the equitable and just mode of dealing with the case. Well, I cannot conceive that in this case the doctrine of admixture can be applied for this purpose. In strictness it only ought to be applied where it is impossible to make out how much was the trust fund and how much was the trustee's money. Here there is no difficulty at all upon this point. The exact figures are perfectly well known, and it is quite possible to make the separation which the trustee now desires to have made, the claim being made against him or upon his right against the trust estate.

But then it is said, and I must say I am very much indebted to Mr. *Warrington's* argument, which was an extremely ingenious and able one, that the trustee, although he may have this lien, cannot enforce it until the trust for sale of this purchased estate arises again. But it seems to me, with all possible respect for that argument, that it is not sound. If the trustee has a right to

(1) 3 Sm. & Giff. 552.

KAY, J.
1882
In re PUMFREY, DECEASED.
WORCESTER CITY AND COUNTY BANKING COMPANY *v.* BLICK.

be indemnified out of the trust estate there is no reason why he should wait for his indemnity until the trust estate has been turned again into money under the trust. His right of indemnity gives him a right of charge or lien upon the trust estate, he has a right to come at any time and say, "I claim to have my right of indemnity, I am now called upon to pay a sum of money for which I have a right of indemnity out of the trust estate, and that gives me the right in equity to have a charge against the estate, and to have the charge enforced by the process of the Court of Equity." It would be extremely harsh upon trustees, who are treated with all proper severity and quite harshly enough by the Rules of this Court, if when they have a right of indemnity it should be held that they are not to be allowed to enforce that right of indemnity until the estate happens to be turned into money under the trust contained in the settlement. I do not think there is any such rule. I think if a trustee has a right of indemnity he has a right to come to this Court to enforce it; but then that right of indemnity must be enforced only subject to the right of the trust, and I hold the right of the trust to be this, to have this estate treated, to use the words of the settlement, "as an investment" for the amount of the trust moneys expended in purchasing it, and that the trust estate has the first charge upon this purchased property for the full amount of that money; and if it is not more than sufficient to pay the money required, the trustee's right of indemnity is only a second right subject to that and must fail. On the other hand, supposing the trust estate so purchased should produce more than enough to pay the trust fund, and to satisfy the trustee's right of indemnity, then it seems to me that the profit of this transaction must belong entirely to the trust estate. That is according to the well known case of *Phayre* v. *Peree* (1), referred to in Lord *St. Leonards'* book (2), and many other authorities. Therefore, I think I must in this case declare that the bank have a right to stand in the place of *Charles Pumfrey* as against the trust estate, and that *Charles Pumfrey's* estate (for he is now dead) has a right, subject to those prior rights of the trust estate which I have

(1) 3 Dow. 116.
(2) See *Sugden's* Law of Property, p. 160; *Sugden* on Vendors and Purchasers, pp. 708, 710.

mentioned, to be indemnified out of the trust property in respect of all the moneys advanced by the Plaintiffs which were actually invested in or about the purchase of this property. There must be an account of such moneys. There must be an order upon *Walter Sandell Mappin* to pay this, and his life estate must be impounded.

The Plaintiffs may take liberty to apply to realize the lien against the trust estate; but upon that application it must be proved to the satisfaction of the Court that *Walter Sandell Mappin* cannot pay, and that every reasonable means of making him pay have been exhausted.

Solicitors: *Church & Co.*, agents for *T. Southall, Worcester; Wilkins, Blyth, & Dutton.*

W. W. K.

WILDER *v.* PIGOTT.

[1881 W. 564.]

Marriage Settlement—Wife an Infant—Separate Estate—Agreement to settle after-acquired Property—Deed acknowledged by Wife after full age—Confirmation of Settlement—Election by Married Woman—Wife of Unsound Mind—Jurisdiction of Court to elect for.

By a marriage settlement made in January, 1874, the wife being an infant, personal property derived under her father's marriage settlement was assigned by the husband and wife to trustees upon the usual trusts. There was a covenant by the husband that he and his wife would so soon as she should attain the age of twenty-one years convey and assign real and personal property to which she was entitled under the will of her father; and it was provided that if the wife should refuse or neglect to do so it should be lawful for the trustees to accumulate any part of the income payable to her for the other persons interested under the settlement. There was an agreement to settle the wife's after-acquired personal property. The wife, on the 13th of April, 1874, a week after she attained the age of twenty-one, and her husband executed a deed, which she acknowledged, by which she assigned all the personal property expressed to be assigned by the settlement which had not become vested in possession, and conveyed property purported to be conveyed by the settlement upon the trusts thereof.

At the date of the settlement she was contingently entitled to a reversionary interest in personal estate, but it was not actually assigned by the deed of confirmation because it did not come within the provisions of *Sir*

KAY, J.

1882

WILDER v. PIGOTT.

8 App Cas 423

R. Malins' Act, 20 & 21 Vict. c. 57. It fell into possession, and it was by the direction of the wife and her husband invested in the names of the trustees. The husband had died, and the wife had become of unsound mind, but not so found by inquisition. On summons by the infant children, by their next friend :—

Held, following the cases of *Barrow* v. *Barrow* (1) and *Smith* v. *Lucas* (2), that the wife could during her coverture elect to confirm the settlement, and that she had by her acts elected.

The wife having become of unsound mind, if she had not elected the Court would have made an election on her behalf, it having jurisdiction to bind the equitable interests of lunatics, not so found by inquisition, when it appears to be for their benefit.

Jones v. *Lloyd* (3) followed.

BY an ante-nuptial settlement dated the 27th of January, 1874, made between the Rev. *George Gordon Wilder*, the intended husband, of the first part, and *Honora Elizabeth Graham Smith*, the intended wife, at that time an infant, of the second part, and four trustees—the Defendants—of the third part, certain personal property of the intended wife, derived under her father's marriage settlement, was assigned by the intended husband and wife to the trustees upon the usual trusts. The deed contained a covenant by the intended husband that if the marriage should take place he and his wife would so soon as she should attain the age of twenty-one years convey and assign certain freehold and leasehold property of the wife to the trustees, and also certain personal property to which she was entitled under the will of her father, and it was provided that if the wife should refuse or neglect so to convey and assign the said premises and property it should be lawful for the trustees to accumulate all or any part of the income payable to the wife under the settlement to form a fund to make good any loss thereby sustained by other persons interested under the settlement. It was further agreed "that if the said *Honora E. G. Smith* now is, or if during the said intended coverture she or the said *George Gordon Wilder* in her right" shall become, possessed of or entitled to any personal property of the value of £300 or upwards "for any estate or interest whatsoever in possession, reversion, remainder, or expectancy," except jewels, they would assign and assure the same to the trustees as therein

(1) 4 K. & J. 409 (2) 18 Ch. D. 531.
(3) Law Rep. 18 Eq. 265.

mentioned. The deed was executed by the intended wife, though an infant. The settlement included certain property brought in by the husband in which the wife took a life interest under the trusts. The marriage was shortly afterwards solemnized. The wife attained twenty-one on the 6th of April, 1874, and on the 13th of that month she and her husband executed a deed (indorsed upon the settlement), which she acknowledged, and by which she purported to assign all the personal property expressed to be assigned by the settlement, which had not become vested in possession, and also to convey the real property purported to be conveyed by the settlement to the trustees upon the trusts thereof. At the date of the settlement she was contingently entitled to a reversionary interest in certain personal property under her father's settlement which it was admitted would have been bound by the assignment or by the covenant in her own settlement if that assignment or covenant could be treated as obligatory upon her.

This was not actually assigned by the deed of confirmation of the 13th of April, 1874, because it did not come within Vice-Chancellor *Sir R. Malins' Act* (20 & 21 Vict. c. 57), the date of the father's settlement being before the passing of that statute. Afterwards, in 1875, the reversionary fund having fallen into possession, £400, part of it, was by the written direction of the wife and her husband invested in the names of the trustees of her marriage settlement.

On the 2nd of November, 1876, the Rev. *George Gordon Wilder*, the husband, died.

This was a summons taken out by the two infant children of the marriage, the Plaintiffs in an action by their next friend for the administration of the trusts of the settlement, asking in effect that a portion of the funds (£400) to which the wife was entitled under her father's marriage settlement, and which was not reduced into possession during the coverture, might now be paid to the trustees of her marriage settlement. Mrs. *Wilder* had become of unsound mind, but had not been so found by inquisition. She was represented in this matter by a guardian *ad litem*.

S. Dickinson, for the Plaintiffs, in support of the summons.

KAY, J. 1882 WILDER v. PIGOTT.

This sum of £400, a moiety of a sum of £800, was part of a much larger sum which was invested on mortgage. It was paid off in the husband's lifetime, and it came to the wife under her father and mother's settlement. It ceased to be contingent and became a vested *chose in action* from the moment of the marriage with Mr. *Wilder*. It is submitted that the wife could during the coverture, after she had attained the age of twenty-one years, and that she actually did (and when she was of sound mind) elect to confirm the settlement: *Barrow* v. *Barrow* (1); *Smith* v. *Lucas* (2). If the Court should be of opinion that the wife did not elect, then it is submitted that the Court has by virtue of its inherent jurisdiction power to elect on her behalf; and that the Court will elect to confirm the settlement for the reason that the money came under covenant, which though it was voidable was not void, to settle after-acquired property for her benefit. If the fund was not bound by the covenant it was bound by her election: *Codrington* v. *Lindsay* (3); *S. C.* on app. *Codrington* v. *Codrington* (4). The wife was bound to take under the settlement or against it, and she by her acts shewed that she meant to take under it: *Brooke* v. *Lord Mostyn* (5). If the Court should be against the election then the clause which declared that in case "the wife should refuse or neglect" to assign, &c., there should be an accumulation of the income for the other persons interested, would come into operation; but it is submitted that being for her benefit the Court will, if necessary, elect, and that the trustees are entitled to the fund.

[KAY, J., referred to the case of *Robinson* v. *Wheelwright* (6)].

W. B. Coltman, for the wife's guardian *ad litem*:—

While the wife was under coverture she could not elect so as to bind her reversionary *chose in action*; nor could she dispose of it at all except under the provisions of Vice-Chancellor *Sir R. Malins' Act* (20 & 21 Vict. c. 57). The wife did not elect after the coverture and before she became of unsound mind, and the questions are:—Can the Court elect for a person of unsound mind not so found by inquisition? and if the Court can do so, will it

(1) 4 K. & J. 409.
(2) 18 Ch. D. 531.
(3) Law Rep. 8 Ch. 578.
(4) Law Rep. 7 H. L. 854.
(5) 2 D. J. & S. 373.
(6) 6 D. M. & G. 535.

do so in this case? It is submitted that the Court cannot elect in such a case; but if it can it will do so only where it would be for the benefit of the person under disability, and in this case it would not be for the pecuniary advantage of Mrs. *Wilder* to elect on her behalf.

S. Dickinson, in reply.

KAY, J., after stating the facts above set forth, said:—

The first question is whether the wife could elect during her coverture to confirm the settlement. It seems clear from the decisions in many cases of which *Barrow* v. *Barrow* (1) and *Smith* v. *Lucas* (2) are examples, that she could so elect. Then has she in fact elected? I cannot doubt that the acts which I have referred to, and which manifested a deliberate intention on her part to recognise the settlement, amounted to an election to confirm it. The effect of such a confirmation was to make the settlement as binding and as operative in equity as it would have been if she had been of full age at the time when she executed it. In that case it is not disputed that this contingent reversionary property would have been bound in equity by the settlement. It was more than a mere expectancy, it was property to which she was at the date of the settlement contingently entitled in reversion; and it seems to come within the very words of the first assignment as well as of the covenant. The covenant, as was remarked in *Smith* v. *Lucas*, was not void but only voidable, and when ratified was as binding as if it had been originally made by a person who was *sui juris*. In that view of course no case of election arises.

If the wife was not to be treated as personally bound by the assignment or covenant, it would be necessary to consider whether the Court ought not now to elect on her behalf, as she is now of unsound mind though she has not been so found by inquisition. Supposing she were to take this fund against the settlement her life interest in the other settled property would have to be impounded to compensate for the loss so occasioned. It seems to me that it would be more for her benefit to elect to take under

(1) 4 K. & J. 409. (2) 18 Ch. D. 531.

KAY, J.
1882
WILDER
v.
PIGOTT.

the settlement, and if she had not already elected that would be the election which should now be made on her behalf.

A doubt was suggested as to the jurisdiction of the Court so to bind the equitable interest of the lunatic. In *Jones* v. *Lloyd* (1) the Court adopted this statement of Lord Justice *James* (2): "The Court of Chancery is not the curator either of the person or the estate of a person *non compos mentis* whom it does not and cannot make its ward. It is not by reason of the incompetency, but notwithstanding the incompetency, that the Court of Chancery entertains the proceedings . . . The Court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind. If there be a trust property in which the person is beneficially interested, the Court may, no doubt, deal with it in such manner as it may deem just, and it will, if necessary, ascertain the nature and extent of his interest, and will authorize, and in a proper case compel, the trustee to deal with the lunatic's interest in the trust property for his benefit. But that arises from its inherent absolute jurisdiction over trusts and trust funds. So in a case of partnership, it may make the necessary orders with respect to the partnership and its assets, notwithstanding the incompetency of the partner; but that again is a consequence of its ordinary jurisdiction in partnership matters, which is not ousted or paralyzed by such incompetency."

In that case a bill was filed by a next friend on behalf of a person of unsound mind not so found by inquisition, against the partner in business of the Plaintiff, alleging that the Plaintiff had for some time past been suffering from softening of the brain and was of unsound mind, and that it would be for his benefit that the partnership should be dissolved; and praying that the partnership might be dissolved and accounts taken, and the share of the Plaintiff in the assets secured for his benefit and for a receiver:— and it was held on demurrer that the suit could be maintained, and the Master of the Rolls (3) said "the lunatic must have an undoubted right to say: 'This is a case in which it will be for my benefit that the partnership should be dissolved, and therefore

(1) Law Rep. 18 Eq. 265. (2) Law Rep. 18 Eq. 276.
(3) Law Rep. 18 Eq. 277.

I am entitled to some protection for the assets even before the decree for final dissolution.' And he is entitled to submit that case to the judgment of the Court, and for that purpose, at all events, to make the necessary application."

I believe that the Court has been in the habit of binding the equitable interests of lunatics not so found by inquisition where it appears to be for their benefit, and I am of opinion that it has jurisdiction to do so.

Solicitors: *Janson, Cobb, & Pearson.*

T. F. M.

GLEADOW *v.* LEETHAM.

[1875 G. 37.]

Annuity—Trustees to pay Wife "clear yearly sum"—"Free from all deductions and abatements whatsoever"—Annuitant to pay Income Tax.

Testator declared that his trustees should stand possessed of his residuary estate and directed them out of the income to pay to his wife "the clear yearly sum of £600" for life if she should remain his widow, but if she should marry again an annuity of £100 in lieu of the annuity of £600, "the said annuities of £600 and £100, as the case may be, to be paid free from all deductions and abatements whatsoever." By a codicil an annuity of £1000 was given in lieu of £600:—

Held, that the annuity was not given free from income tax.

ACTION FOR ADMINISTRATION.

William Leetham, who died in January, 1875, by his will made in September, 1864, after appointing three executors and trustees, and giving directions in reference to the management and conversion of his estate, not material to be mentioned, declared that his trustees should stand possessed of his residuary personal estate, and of the funds in which the same should be invested, and the income thereof, upon trust by and out of the income to pay to his wife "the clear yearly sum of £600" during her life, if she should so long remain his widow, in half yearly portions, but if she should marry again then the trustees were to pay her during her life for her sole and separate use an annuity of £100 in lieu of the annuity of £600; "the said annuities of £600 and

KAY, J.
1882
GLEADOW
v.
LEETHAM.

£100 as the case may be to be paid free from all deductions and abatements whatsoever." By a codicil made in April 1869 "an annuity of £1000 in lieu of the annuity of £600" was bequeathed and in all other respects he confirmed his will. The residuary estate was given by the testator to the trustees in trust for the benefit of his children.

W. W. Karslake, Q.C., and *R. Bramwell Davis*, for the Plaintiff trustee, stated the facts.

Hastings, Q.C., and *G. Curtis Price*, for the Defendant—the widow:—

The annuitant is entitled to have her annuity paid without any deduction in respect of income tax. There is enough to shew that the testator intended the income tax should be paid out of some other fund, and if that is not done, his widow, to whom it should be observed the annuity was given, and not to a stranger, would not be paid "the clear yearly sum" which he directed the trustees to pay to her "free from all deductions and abatements whatsoever." The most recent case and exactly in point is that of *In re Bannerman's Estate* (1), and the decisions in *Lord Lovat* v. *Duchess of Leeds* (2), *Festing* v. *Taylor* (3), and *Peareth* v. *Marriott* (4), may be relied on in support of the contention that no deduction whatsoever should be made for income tax.

Northmore Lawrence, for the Defendant, *W. Leetham*, the eldest son:—

The annuity must bear the deduction of income tax. In all the cases which can be referred to for the annuitant the word "tax" or "taxes" is mentioned, and the word "deduction" has been construed by association with it to extend to income tax. The Master of the Rolls in *Lethbridge* v. *Thurlow* (5), held that income tax is not properly a deduction, but a charge which the Legislature has imposed upon the person who receives the money, and with the exception of the word "abatements" there is no

(1) 21 Ch. D. 105.
(2) 2 Dr. & Sm. 62.
(3) 3 B. & S. 217.
(4) *Ante*, p. 182.
(5) 15 Beav. 334–339.

distinction between that case and the present. The decisions in *Abadam* v. *Abadam* (1), *Turner* v. *Mullineux* (2), and *Sadler* v. *Rickards* (3), support that view. The cases are collected and commented upon in *Jarman* on Wills (4).

Peareth v. *Marriott* (5) is not an authority at all, but if it can be looked at as one it is in favour of deduction from the annuity. No distinction can be drawn between an order made in Chambers and in Court—both are made by the Judge, and it makes no difference whether the annuitant be a widow or any other person.

W. Pearson, Q.C., and *Borthwick*, for parties in the same interest:—

The testator has simply given an annuity of £1000 to his widow out of his estate, and though the *Income Tax Act* provides that the person who has to pay the annuity shall pay the tax to the proper officers, yet the tax itself is a personal charge upon the person who receives the annuity. The testator has not given his widow the income tax in addition, but has left her to pay it out of the annuity.

Davenport, and *Seaton*, for other parties in the same interest.

Hastings, in reply:—

The cases which have been referred to for the Defendant *W. Leetham* have been overruled by the subsequent decision of *In re Bannerman's Estate* (6). The case is as clear as if the testator had said free from all deductions and abatements of parochial and other taxes whatsoever, therefore the annuity ought to be paid in full to the widow.

KAY, J.:—

There are two classes of cases in reference to this question,—one where by will a testator gives an annuity, and then directs that it shall be free from all deductions in respect of any taxes, and of this class of cases the principal examples are *Festing* v.

(1) 33 Beav. 475.
(2) 1 J. & H. 334.
(3) 4 K. & J. 302.
(4) 4th Ed. vol. i. pp. 187–188, n.
(5) *Ante*, p. 182.
(6) 21 Ch. D. 105.

KAY, J.
1882
GLEADOW
v.
LEETHAM.

Taylor (1), a decision of the Exchequer Chamber; *Lord Lovat* v. *Duchess of Leeds* (2); and *In re Bannerman's Estate* (3). In all these cases the word "deduction" was construed by the word "taxes" which was associated with it, and it seems to have been held that the annuity was to be paid free of income tax. The other class of cases is where the words are "to be paid without any deduction" or "free from legacy duty and other deductions," and in those cases the income tax was held to be payable by the annuitants, because income tax, as it seems to have been stated over and over again, is not properly speaking a deduction, and there must be something else besides the word "deduction" to make the gift of an annuity free of income tax. It was only where the word "deduction" was coupled with the word "taxes," or there was some other indication that it was meant to include income tax, that it was so construed. Of this second class of cases the principal examples are *Lethbridge* v. *Thurlow* (4), *Abadam* v. *Abadam* (5), and *Sadler* v. *Rickards* (6).

In *Turner* v. *Mullineux* (7) the gift was in this way: a demise by the testator to trustees upon trust out of the rents and profits to pay to his widow during widowhood an annuity of £350, "free from income or property tax or any other deduction," and after a declaration that it was to be in full of all claims for dower, there was a further trust out of the rents and profits "to pay to each of the testator's daughters an annuity of £100 a piece," to be paid "free from all deductions," and after the second marriage of the widow, which had happened, to pay to one of the daughters "the further annuity of £150, free from deduction."

It was the last words which had to be construed, and Vice-Chancellor Sir *W. Page Wood* said (8): "This Court always holds that income tax is not a deduction; but here the testator in the first instance speaks of 'income or property tax and all other deductions,' which explains that he understood the word 'deduction,' as extending to income tax. When he afterwards goes on to give other annuities and shortens his form of expression to, in

(1) 3 B. & S. 217. 9 Jur. N.S. 44
(2) 2 Dr. & Sm. 62.
(3) 21 Ch. D. 105.
(4) 15 Beav. 334.
(5) 33 Beav. 475. 10 Jur. N.S. 50
(6) 4 K. & J. 302.
(7) 1 J. & H. 334.
(8) Ibid. 335.

the last gift, 'free from deduction.' The true way of construing the will is, not to interpret the last gift and carry back that construction of the word 'deduction' to the earlier clauses, but to read the word throughout in the sense in which it is first used." In other words, the testator by his will put on the word "deduction" a meaning which evidently shewed that he intended it to include income tax, and accordingly it was held that it was included in the subsequent words "free from all deductions" and "free from deduction." One other case on this point I desire to refer to specially, that of *Sadler* v. *Rickards* (1), where the words of gift, which was by will, were upon trust to invest the proceeds as therein mentioned, and the trustees were, out of the income arising from the investments to pay the annual sum of £500 "free from legacy duty and other deductions" to the testator's wife during her life, and, subject thereto, to apply the income for the benefit of his children, and Vice-Chancellor Sir *W. Page Wood* said (2), "Without going into the question how I should have decided the point in the absence of those authorities" [*Wall* v. *Wall* (3) and *Lethbridge* v. *Thurlow* (4)], "I must hold that this annuity is subject to income tax under the recent Act" [16 & 17 Vict. c. 34], "and the tax must be paid out of the annuity itself."

In this case the words are not quite like those I have read in the two cases from which I have quoted. The question is, within which of the two classes of cases the gift in this case comes. It is to be "the clear yearly sum" . . . "free from all deductions and abatements whatsoever." I may observe that there is no use of the word "tax" or anything of the kind. It was contended that this case is distinguishable from the latter class of cases, for the reason that the annuity was given by the testator to his wife, "to pay to his wife the clear yearly sum of." If, however, income tax be not a deduction, but a payment which she has to make herself, not out of the annuity, but because she receives the annuity, I do not consider that the word "clear" carries the matter any further. If it be not a deduction, then the annuity is paid to her clear of any deduction. I do not think that it is well for Judges to make fine distinctions in cases of this kind. It is much better and more

(1) 4 K. & J. 302.
(2) Ibid. 304.
(3) 15 Sim. 513.
(4) 15 Beav. 334.

KAY, J.
1882
GLEADOW
v.
LEETHAM.

beneficial to the world in general that the broad line of demarcation should be adhered to and not departed from. It seems to me that this case comes within the latter of the two classes of cases to which I have referred, it being a case in which there is no reference to the word "tax," but merely a direction that the annuity shall be paid free from all deductions and abatements, and of the clear yearly sum mentioned.

I confess that but for the authorities referred to I should have felt a little more difficulty than I do, because the annuity being given by the testator to his wife, I do not see what the direction was aimed at if not the income tax. The widow would not have to pay legacy duty, therefore the testator could not have meant that. It is possible to give a meaning to the word "abatements" because, though not likely in this case, the income might not be enough to pay the annuity, and in that case the word "abatements" might mean that it should come out of capital.

But it seems difficult to give a meaning to the word "deductions" when coupled with "abatements," in the case of an annuity to a wife. I cannot help thinking that it is possible, if the testator had been asked what he meant, he would have said that he intended to refer to income tax, and that it should be paid out of his estate; but without speculating on what the testator might have meant, I must adhere to the rule of construction laid down in the decisions, and consequently I am not at liberty to treat income tax as being a deduction. I therefore hold that the widow must pay the income tax—that the annuity was not given free of it.

Solicitors: *Chester & Co.*, agents for *Holden, Sons, & Hodgson, Hull; Rollit & Sons*, agents for *Rollit & Sons, Hull; A. R. Oldman.*

T. F. M.

CHITTY, J.
1882
Nov. 16.

In re ALLNUTT.
POTT *v.* BRASSEY.

[1882 A. 169.]

Marriage Settlement—Covenant—After-acquired Property—Will—Gift to Wife —"Separate Use."

By an ante-nuptial settlement the husband and wife covenanted with the trustees to settle all property to which the wife then was or during the coverture she or her husband in her right should become entitled by devise, bequest, or otherwise "for any estate or interest whatsoever."

During the coverture the wife's father died, having by his will devised and bequeathed a moiety of his residuary real and personal estate to her "for her separate use, independently of any husband."

Held, that the moiety was bound by the covenant.

In re Mainwaring's Settlement (1) not followed.

SPECIAL CASE.

By the ante-nuptial settlement, dated the 8th of October, 1860, of the Defendants, Sir *Thomas Brassey* and Lady *Brassey* (then *Anna Allnutt*), certain trusts funds were settled upon trust for Lady *Brassey* during her life for her separate use without power of anticipation, and after her death for Sir *T. Brassey* during his life, and after the death of the survivor for the children of the marriage. And the settlement contained a covenant by Sir *Thomas* and Lady *Brassey* with the trustees "that if the said *Anna Allnutt* now is, or if at any time or times during the said intended coverture she or the said *Thomas Brassey* in her right shall become entitled by . . . . devise, bequest, gift . . . . or otherwise, to any real or personal property of the value of £500 or upwards, for any estate or interest whatsoever" (except jewels, &c.), the same should be settled upon trusts corresponding to those declared of the original trust funds.

John Allnutt, the father of Lady *Brassey*, by his will, dated the 6th of October, 1875, devised his residuary real estate to his trustees upon trust for sale, and to hold the proceeds upon the same trusts as were thereinafter declared concerning his residuary

(1) Law Rep. 2 Eq. 487.

CHITTY, J.
1882
In re ALLNUTT.
POTT *v.* BRASSEY.

personal estate, except the recommendation or precatory trusts thereinafter contained relative thereto. And he bequeathed his residuary personal estate to his trustees upon trusts for conversion, and to hold the proceeds (after payment thereout of his debts, &c., and legacies) upon trust for his wife the Defendant *Clementia Allnutt*, and his daughter, Lady *Brassey*, and the survivor of them "for the respective separate use of them or her independently of any husband": but he recommended his said wife and daughter, or the survivor of them, to dispose of his said net residuary personal estate, or so much thereof as he might dispose of by his will for charitable purposes, for or in favour of such charitable institution as his said wife and daughter, or the survivor of them, in their or her absolute discretion, should think fit; nevertheless he declared that such recommendation as to the disposition of his said net residuary personal estate was and should be precatory only, not imposing on his said wife and daughter, or either of them, any legal or equitable obligation or trust whatsoever, or interfering with their or her full and absolute right of property in relation thereto.

The testator died on the 5th of May, 1881, possessed of both real and personal estate to a large amount. Questions having arisen whether and to what extent the interests of Lady *Brassey* under her father's will were bound by the covenant in her marriage settlement, this special case was stated by consent under Rules of Court, 1875, Order XXXIV., in order to obtain the opinion of the Court whether (amongst other questions) the interest (if any) of Lady *Brassey* under the said residuary gifts was, to any and what extent, bound by her marriage settlement, having regard, amongst other things, so far as the residuary personal estate was concerned, to the recommendation given by the said will to the Defendants, Mrs. *Allnutt* and Lady *Brassey*, to dispose of the testator's net residuary personal estate for charitable purposes; and what was the effect (if any) of such recommendation upon the interests therein taken by the said Defendants respectively. Also whether under the said residuary gift the Defendants, Mrs. *Allnutt* and Lady *Brassey*, were entitled to the income of the residuary estate during their joint lives, and whether as joint tenants or as tenants in common, with remainder, as to the capital, to the survivor, or

whether they were entitled in equal shares as tenants in common, or what were the interests taken by them respectively.

It appeared that Mrs. *Allnutt* was the testator's second wife and was of about the same age as Lady *Brassey*, their chances of survivorship being thus nearly equal. It was accordingly arranged at the hearing of the special case that the residue should be treated as divisible between them in equal moieties.

Macnaghten, Q.C., and *C. Comyns Tucker*, for the Plaintiffs, the trustees of Sir *Thomas* and Lady *Brassey's* settlement:—

It is clear that Lady *Brassey* is under no legal obligation to comply with the recommendation expressed by the testator with respect to her share of the residue: consequently she takes it unfettered by that recommendation. The question is whether the trust "for her separate use independently of any husband" prevents the covenant in her marriage settlement operating upon her share, as it clearly would have done had those words been omitted. We submit, however, that those words do not prevent the operation of the covenant, and that the share is therefore bound by the settlement. The only authority that appears to be opposed to that view is *In re Mainwaring's Settlement* (1); but the decision in that case has not been generally considered satisfactory: *Davidson's* Conveyancing Precedents (2). Moreover, the Vice-Chancellor seems to have been guided by the special terms of the will and codicils in that case.

Ince, Q.C., and *E. Hume*, for the Defendants, Sir *Thomas* and Lady *Brassey*:—

Lady *Brassey* is desirous of complying with the testator's recommendation as expressed in his will if she is at liberty to do so; but it is useless to contend that that recommendation creates any binding trust or obligation. For the purpose, therefore, of ascertaining Lady *Brassey's* position, we admit that the case must be treated as if there were no words of recommendation attached to the gift of her share of residue, except that they afford some argument in favour of the view that she was to enjoy the property in the particular manner indicated by the will, and no other, and

(1) Law Rep. 2 Eq. 487. (2) 3rd Ed. vol. iii. pp. 199, 200.

CHITTY, J.
1882
In re ALLNUTT.
POTT *v.* BRASSEY.

that therefore it ought not to be treated as included in the settlement. As to the trust for separate use, we submit that its effect is to prevent the operation of the covenant. The principle of the decision in *In re Mainwaring's Settlement* (1) is that if the donor of the after-acquired property attaches to the gift a peculiar mode or condition of enjoyment it shall be enjoyed according to that mode or condition and no other. That decision has never been overruled, and we submit that it governs the present case, the words here being, though not quite so full, yet substantially the same as in that case.

Brooks v. *Keith* (2) and *Coventry* v. *Coventry* (3) are also authorities in support of the view that property given to a married woman "for her separate use" is not included in a covenant for the settlement of her after-acquired property.

Prior, for the Defendant, Mrs. *Allnutt*.

Romer, Q.C., and *F. C. Norton*, for the Defendants, the trustees of the will and codicil.

CHITTY, J., after referring to the will, and stating that the recommendation clearly amounted to a mere expression of wish, and nothing more, continued:—

The result is that there is an expression of wish on the testator's part which has no binding effect in any Court of law or equity. The property is, therefore, the property of Lady *Brassey*. Has she entered into any obligation with regard to property of this amount? She has. She has done so by a covenant in her marriage settlement. Upon the construction of the will it is clear the testator's intention is only to make a gift to the person; and then comes the covenant by that person, which is the obligation she has entered into with regard to the property comprised in that gift.

The question is whether there is any authority contrary to that view. *In re Mainwaring's Settlement* has been referred to in support of the view placed before the Court on behalf of Lady

(1) Law Rep. 2 Eq. 487. (2) 1 Dr. & Sm. 462.
(3) 32 Beav. 612.

Brassey. I should say that Lady *Brassey* herself appears to be desirous of giving effect, if she has power to do so, to the wishes which are expressed, though in no legal binding manner, in the testator's will. In *In re Mainwaring's Settlement* (1) there was an assignment of the after-acquired property by the wife, and Vice-Chancellor Sir *William Page Wood* held that that was equivalent to a contract on her part. Then he examines the will and codicils, and he says that he finds (at least that is the way I understand the judgment) they had been so framed that the covenant would not apply to the property given by the will. With reference to the second codicil, whereby the testatrix directed her trustees to pay such part of the legacy to her daughter as she might require "for her separate use, independent of her husband, and to be free in all respects from his debts, control, and engagements," the Vice-Chancellor says this (2): "She therefore means to say, 'I do not intend this portion of my daughter's property to be comprised in her settlement; I intend that she shall take it upon this express condition, that it shall not be settled.'" I respectfully dissent from that proposition, and I think I ought on principle to dissent from it if it is meant that I am to regard the testator's intention when it is expressed in some manner which is not legally binding. Taking the whole judgment together, I think the Vice-Chancellor intended to decide, as a question of construction of the will, that the gift was such that it did not fall within the scope of the covenant, in other words, that it did not fit the covenant. That may be treated as a question simply of construction of the will, and if so, of course the decision does not bind me in any way. I am unable to appreciate, sitting here judicially, the grounds of the judgment as stated, and they seem to me to be not consistent with the true principle on which cases of this kind ought to be decided.

Another case which has been mentioned is that of *Brooks* v. *Keith* (3), where the question had reference to certain property which was given in such a manner as to render it, according to Vice-Chancellor *Kindersley's* judgment, doubtful whether, if the property were held to be included in the covenant, it would not

(1) Law Rep. 2 Eq. 487. (2) Law Rep. 2 Eq. 495.
(3) 1 Dr. & Sm. 462.

CHITTY, J. 1882 *In re* ALLNUTT. POTT *v.* BRASSEY.

be forfeited under the terms of the will. He says (1), "If the Court in this suit were to direct an assignment, the question would arise whether such an assignment would come within the meaning of this clause, 'sell, assign, &c.,' I should be inclined to think that it would not; and that by the clause was meant such an alienation as would deprive the parties of the property." The Vice-Chancellor does not act upon that view: on the contrary he seems to have grounded his decision upon the view that the assignment would create a forfeiture. I may say I should have no doubt that if the will is so framed that the covenant cannot operate upon the property, the covenant does not operate upon it. If the only effect of the covenant would be to say that, if there is an alienation by the covenant within the meaning of the term used in the will, that is a forfeiture of the legacy, the Court would probably hold that the covenant did not apply, because to attempt to make it apply would only be doing an idle thing. The property could not fall within the settlement, because the covenant would create a forfeiture. If that is the ground, as I rather think it was, of the Vice-Chancellor's decision, I think it is a decision entirely consistent with principle. There is another ground which is not noticed in the judgment, though it is noticed in the text-books with reference to this question, namely, that the covenant there was so framed as to make it apply only so far as the husband was interested in the property. I take it that, upon that ground alone, although not referred to in the judgment, the decision might be supported. At any rate, I do not consider there is any principle enunciated by either of the two decisions to which I have referred, that is opposed to the conclusion at which I have arrived; and I therefore hold that Lady *Brassey's* moiety of the residue is included in the covenant contained in her marriage settlement.

Solicitors: *Norton, Rose, Norton, & Brewer.*

(1) 1 Dr. & Sm. 466.

G. I. F. C.

WOOD *v.* WHEATER.

CHITTY, J.

1882

Nov. 24.

[1881 W. 2967.]

Practice — Mortgagor — Mortgagee — Order for Foreclosure absolute — Writ of Possession — Action for Recovery of Land — Action for the Recovery of the Possession of Land — Rules of Court, 1875, *Order* XVII., *r.* 2; *Order* XLII., *r.* 3.

An order for foreclosure absolute is not a judgment for the recovery of the possession of land within the meaning of Order XLII., rule 3, of Rules of Court, 1875.

Hence after foreclosure absolute the Plaintiff is not entitled to a writ of possession.

THE Plaintiff was the mortgagee of certain freehold premises of which the Defendant, the mortgagor, was in occupation.

In November, 1881, the Plaintiff commenced an action against the Defendant, and obtained the usual foreclosure judgment, and subsequently the Defendant, having failed to pay the sum found due, the Plaintiff obtained the usual order for foreclosure absolute.

The Defendant having refused to give up possession of the mortgaged hereditaments, the Plaintiff served him with notice of motion under Order XLII., rule 3, for a writ of possession to be directed to the sheriff of *Yorkshire* to deliver possession to the Plaintiff.

Wiglesworth, for the Plaintiff:—

The cases of *Heath* v. *Pugh* (1) and *Harlock* v. *Ashberry* (2) decide that a foreclosure action is an action for the recovery of land, and the question here is whether it is also an action for the recovery of the possession of land, so that an order for foreclosure absolute may be enforced by a writ of possession under Order XLII., rule 3.

Before the *Judicature Act* no doubt an action of ejectment must have been brought in order to enforce a foreclosure decree against a defendant refusing to deliver up possession; but I submit that since the Act a second action is no longer necessary, and that the rule was framed in order to meet this case.

(1) 6 Q. B. D. 345; 7 App. Cas. 235. (2) 19 Ch. D. 539.

CHITTY, J.

1882

WOOD v. WHEATER.

The Defendant did not appear.

CHITTY, J.:—

A foreclosure action, although held in *Heath* v. *Pugh* (1) to be an action for the recovery of land, is not an action for the recovery of the possession of land within the meaning of Order XLII., rule 3. The effect of an order for foreclosure absolute is merely to bar the equity of redemption.

Had there been a judgment in so many terms for the recovery of the possession of the land in question, the Plaintiff would have been within the rule, and entitled to enforce judgment by a writ of possession, but if I were to accede to the present application I should be making an ancillary judgment on motion.

Possibly in future it might be advantageous in every foreclosure action to add a claim for possession.

The motion must be refused.

Solicitors: *Ridsdale & Son*, agents for *Weddall, Parker, & Parker, Selby, Yorkshire.*

(1) 6 Q. B. D. 345; 7 App. Cas. 235.

G. M.

LEES *v.* FISHER.

C. A.
1882
Nov. 2.

[1879 L. 5862.]

Equitable Mortgage—Foreclosure—Form of Order—Practice.

A decree for foreclosure in the case of an equitable mortgage ought not to omit the word "foreclose," but ought to contain directions that upon default the mortgagor will be foreclosed, that the hereditaments will be discharged from all equity of redemption, and that a conveyance must be executed.

THIS was an action by an equitable mortgagee. The Defendant had borrowed a sum of money, and by way of security had deposited with the Plaintiff the title deeds of certain lands. The Defendant having failed to repay the loan, the present action was commenced, and an order was obtained for payment of the amount due, and in default, in effect, for foreclosure (1). The order followed *Seton* on Decrees (2), which is taken from the form of the order made in *James* v. *James* (3). It omitted the word "foreclose." Default having been made in payment during Vacation, Mr. Justice *North*, on motion, made the foreclosure order absolute. The Registrar refused to draw up the order on the grounds (1.) that the order obtained was not a foreclosure judgment; (2.) that it was not the practice to make an order of this kind absolute. The case was again mentioned to Mr. Justice *North*, who affirmed the Registrar.

S. Hall, now moved by way of appeal from the decision of Mr. Justice *North* affirming the Registrar:—

The foreclosure order is in the common and usual form; it is drawn up in the terms of *Seton* on Decrees, which in its turn is based upon the order made in *James* v. *James*. There is no difference between equitable and legal mortgages as to making foreclosure decrees absolute. Thus in *Smith* v. *Boucher* (4) an order

(1) See Weekly Notes, 1880, p. 12, where the case is noted on the form of the order as to payment.

(2) Vol. ii. p. 1126, form 4.

(3) Law Rep. 16 Eq. 153.

(4) 1 Sm. & Giff. 72.

C. A. 1882 LEES v. FISHER.

for foreclosure was made absolute in the case of an equitable mortgage, although as a matter of practice an application under the *Trustee Acts* was directed to stand over and to be made at a subsequent time as a separate application.

The Defendant did not appear.

LORD SELBORNE, L.C. :—

The order which was obtained was tantamount to a foreclosure order; it may therefore be made absolute. But we think that in future foreclosure decrees in cases of equitable mortgages ought to contain the word "foreclose." They ought to contain directions that upon default of payment by the specified time the mortgagor will be foreclosed, that the mortgaged hereditaments will be discharged from all equity of redemption, and that a conveyance from the mortgagor to the mortgagee must be executed. This will be a proper form to use, and the Registrar in attendance must take a note of the point.

JESSEL, M.R., BRETT and COTTON, L.JJ., concurred.

Solicitors: *Pritchard, Englefield & Co.*

J. E. H.

C. A. 1882 *Nov.* 21.

BIGGS *v.* PEACOCK.

[1881 B. 7016.]

Partition Suit—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 4 [*Revised Ed. Statutes, vol. xv. p.* 696]—*Trust for Sale—All Cestuis que trust sui juris.*

A testator directed the trustees of his will at such times and in such manner as they should think fit to sell his copyhold estate, and to hold the proceeds in trust for his widow for life, and after his death for his children. He left six children, all of whom attained a vested interest and were *sui juris*.

The widow and three children brought an action for partition of the estate; the other children, who were Defendants, demurred :—

Held (affirming the decision of *Bacon*, V.C.), that the trustees had a

trust for sale, not a mere power; and that it was not put an end to by all the reversioners attaining a vested interest; and therefore the Court had no jurisdiction to decree a partition under the *Partition Act*.

C. A. 1882

BIGGS v. PEACOCK.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (1).

James Biggs, who died in 1853, by his will dated the 20th of October, 1847, devised his copyhold estate to his widow and certain other trustees, and directed the trustees for the time being of his will, at such times and in such manner as they, she, or he should think fit, to sell his copyhold estate in manner therein mentioned. And the trustees or the survivors or survivor of them were directed to stand possessed of the net moneys to arise from such sales, and of his personal estate, and the produce thereof, upon trust for investment, and to pay the income of such investments to his widow for life, and after her death to stand possessed of the said trust moneys and investments, and the income thereof, in trust for all his children who being sons should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry under that age.

At the time of his death the testator had eight children, two of whom died under twenty-one, and without having been married; the remaining six were all living, and had attained twenty-one. The widow and three of the six children, who had mortgaged their shares in the estate, brought an action for a partition of the copyhold hereditaments, which had been enfranchised.

The Defendants, the surviving trustee, other than the widow, and the remaining three children, demurred to the statement of claim, on the ground that the trust for sale created by the testator's will was still subsisting, and therefore the Court had no jurisdiction to order a partition. The Vice-Chancellor having allowed the demurrer, the Plaintiffs appealed.

Russell Roberts, for the Appellants, contended, as at the hearing in the Court below, that the direction to sell was a power and not a trust for sale, and that it was now at an end, as all the *cestuis que trust* had attained a vested interest and were *sui juris*. He cited *Doncaster* v. *Doncaster* (2), and distinguished *Taylor* v.

(1) 20 Ch. D. 200. (2) 3 K. & J. 26.

C. A. 1882

BIGGS v. PEACOCK.

Grange (1), *Trower* v. *Knightley* (2), *In re Cotton's Trustees* (3), and *Peters* v. *Lewes and East Grinstead Railway Company* (4).

F. T. Procter, for the Defendants, was not called on.

JESSEL, M.R. :—

In this case there is a trust for sale created by a will over the testator's property. It is a trust to sell in the usual way and invest the proceeds and pay the income to the widow for her life, and after her death to divide the capital among the testator's children. It is said that this trust cannot now be enforced. It can be. Any one of the *cestuis que trust* has a right to insist on the trust being carried out. It is a mistake to say that it is like a power given by a will. In such a case the property in the estate is in the devisee. But here the estate is converted into personalty, and the *cestuis que trust* are only entitled to shares of the proceeds. Although no doubt if all are of age and *sui juris* they could call upon the trustee to convey the estate to them, yet none of them has a right in opposition to the others, to insist upon partition being made of it, which would be dealing with it as if it were real estate. I am of opinion that the Vice-Chancellor's judgment is right, and that this case is not within the *Partition Act*. The appeal must be dismissed with costs.

COTTON, L.J. :—

I am of the same opinion. This is a trust for conversion into money, not a power, and one object of its creation was to enable the property to be divided when the proper time arrived; and any one of the children has a right to insist upon that object being carried out. True, if all the *cestuis que trust* agreed, they might call upon the trustee to convey the estate to them, and then there would be a reconversion into real estate. But if they do not all agree there is no reconversion. In the present case they do not all agree, therefore the trust for conversion is not at an end.

(1) 15 Ch. D. 165.
(2) 6 Madd. 134.
(3) 19 Ch. D. 624.
(4) 18 Ch. D. 429.

BOWEN, L.J. :— C. A.

It appears to me perfectly clear that the Plaintiffs would not have been entitled before the *Partition Act* to a decree for partition. Therefore it is not within the *Partition Act.* 1882 BIGGS v. PEACOCK.

Solicitors: *R. Chapman; Blewitt & Tyler.*

M. W.

THE MAYOR, ALDERMAN, AND CITIZENS OF THE CITY OF MANCHESTER *v.* LYONS.

C. A. 1882 *Nov.* 25, 27.

[1881 M. 3246.]

Market—Statutory Market—Extinguishment of Old Franchise by Statute—Disturbance of Market.

Under the powers of an Act of 1844, the corporation of *Manchester* purchased the manorial rights of the manor of *Manchester*, which was co-extensive with one of the six townships included in the borough. Among these rights was an ancient franchise to hold a market, which appeared to have been a Saturday market. After this, by the *Manchester Market Act*, 1846, the corporation were empowered to hold markets on such days as they should think fit at any places within the borough which they should appropriate as market places, and to charge any tolls not exceeding those mentioned in the schedule to the Act (which were higher than the old accustomed tolls), and to make certain charges for weighing which could not have been made under the old franchise. :—

Held (affirming the decision of the Vice-Chancellor of the county palatine of *Lancaster*), that there being under the Act a change of time, a change of place, an alteration of the old charges, an imposition of new charges, and an extension of the market from the township to the borough, the effect of the Act was to give the corporation new rights of holding markets in substitution for the old franchise, and that the old franchise was extinguished.

The corporation brought an action to restrain the Defendants from selling eggs and dried fish on market days in their shop. The shop was situate in a street which adjoined one side of one of the Plaintiffs' markets, and was on the opposite side of the street from, but not opposite to, the entrance from that street to the market. The Defendants only sold their own goods in their shop in the ordinary course of business :—

Held (affirming the decision of the Vice-Chancellor), that this was no disturbance of the statutory right of market.

THIS was an appeal by the corporation of *Manchester* from a decision of the Vice-Chancellor of the county palatine of *Lancaster.*

From the reign of Queen *Elizabeth* down to the year 1846 the

C. A. 1882

MAYOR, &C., OF MANCHESTER v. LYONS.

manor of *Manchester* and the manorial property and franchises connected with it were vested in the *Mosley* family. One of the manorial franchises consisted in the right of holding markets and fairs within the manor, and of levying tolls and stallages in connection therewith. A considerable amount of litigation occurred between the lords of the manor and the inhabitants in relation to the manorial market rights.

By an inquisition in 33 Edw. 3, it was found that the lords of the manor held the vill of *Manchester* as a market town, and mention was made of a market day without specifying on what day of the week it was. In *Mosley* v. *Chadwick* (1) in 1782, the lord prescribed for a weekly market on Saturdays for the sale of butchers' meat within the manor, and established his title to restrain butchers from selling on market day, except in the market. In *Mosley* v. *Pierson* (2), in 1790, he prescribed for a weekly market on Saturdays for the sale of flour and oatmeal, but it did not appear whether he finally succeeded in this action. In *Mosley* v. *Norris* in 1791, the lord prescribed for a weekly market on Saturdays for the sale of flour and oatmeal, and succeeded in this action. In *Mosley* v. *Walker* (3) in 1827, the lord claimed to be entitled to a market for the sale of fish on Tuesdays, Thursdays, and Saturdays, and a right to oblige fishmongers within the manor to make sales of their wares within the market and pay stallage, and he succeeded in this action.

The charter incorporating the borough of *Manchester* was granted on the 23rd of October, 1838. The manor was coterminous with the township of *Manchester*, but the borough included that and five other townships. By 7 & 8 Vict. c. xl., "An Act for the good Government and Police Regulation of the Borough of *Manchester*," the corporation were empowered to purchase the manorial property from the lord of the manor. On the 5th of May, 1846, the purchase was made, and the manor, with certain lands, and with all markets and fairs and tolls of markets or fairs, stallages, franchises, and rights, whether appurtenant to the manor or held in gross, exercisable by the lord within the manor, was conveyed to the corporation.

(1) 3 Doug. 117; 7 B. & C. 47, n. (2) 4 T. R. 104.
(3) 7 B. & C. 40.

By an Act 9 & 10 Vict. c. ccxix., "*The Manchester Markets Act*, 1846," the full title of which was "An Act for providing Market Places and for regulating the Markets and Fairs in the Borough of *Manchester*, in the County Palatine of *Lancaster*" (which received the royal assent on the 16th of July), reciting the purchase of the manorial property, including the tolls and stallages payable in respect of the markets and fairs held within the said manor, and reciting that "it would be a great convenience and advantage to the inhabitants of the said borough and the neighbourhood thereof, and to the public at large, if some of the existing market places were discontinued and others enlarged, and also if new market places were established for the sale of fish, poultry, vegetables, meat, butter, and other provisions, as well as of live cattle, corn, grain, hay, straw, lime, coal, and other marketable commodities usually sold in open market; and it is expedient that provision should be made for the better regulation of the said markets and fairs and for the improvement of the approaches thereto, and for appointing the days on which the same shall be held, and for altering and varying the tolls and stallage now payable in the said markets and fairs or in respect of produce brought within the said borough, and for granting other tolls and stallage in lieu thereof, but the same cannot be effected without the aid and authority of Parliament," it was enacted that the corporation should by the council of the borough be empowered to carry the powers of the Act into execution.

By sect. 4 they were authorized to purchase for the purposes of the Act any property within the borough; and by sect. 5 the *Lands Clauses Act*, 1845, was incorporated.

By sect. 24 they were authorized to erect upon any ground belonging to them or to be purchased under the Act, a market hall of such size, and according to such plan, and with such covered and open space within, or with such open or fenced market place surrounding the same, as they should think proper for the exposure and sale of fish, meat, provisions, and other agricultural produce, and all or any such other marketable commodities as the council should from time to time permit to be exposed and sold therein, with all necessary storehouses, stalls, standings, and other conveniences.

C. A. 1882

MAYOR, &C., OF MANCHESTER v. LYONS.

Sect. 25 enacted that after the market hall and buildings were completed and opened the council might hold and keep a market therein thenceforth for ever on such days in every week as they should from time to time appoint, and permit fish, meat, provisions, and agricultural produce, and such other marketable commodities as they should think fit to allow, to be exposed for sale and sold therein.

Sect. 26 authorized them to hold markets in such other places as they should think fit till the new market hall was opened.

Sect. 27 authorized the council to enlarge all or any of the present market places for the sale of fish, meat, provisions, and agricultural produce and other marketable commodities, or in lieu thereof or in addition thereto to erect on any land belonging to the corporation or purchased by the council for such purpose, such other market places for the sale of such commodities as aforesaid as the council should from time to time think expedient.

Sect. 28 contained similar powers as to cattle markets, and the 29th enabled the council to fix the times during which cattle should be exposed for sale in the cattle markets, and provided for the recovery of tolls in respect of them.

Sect. 30 enabled the council when any new market place had been provided, either to discontinue or continue the use of the present market places, except a specified market for fish and meat and another for meat and pork, which were not to be used as market places after a certain proposed new market had been opened.

Sect. 31 provided that the last mentioned new market should not be used as a cattle market.

Sect. 32 enabled the council to enlarge all or any of the present market places for the sale of hay and straw, or in lieu thereof or in addition thereto to establish upon any land belonging to the corporation or purchased by the council for the purpose, places for the sale of hay and straw and for the holding of fairs.

Sect. 33 empowered the council from time to time to appropriate any land of the corporation for the sites of additional market places or for enlarging any existing market place.

Sect. 36 authorized the council to erect and provide, upon land to be purchased or otherwise provided by them, public weighing

houses and places in or near the market hall and markets for weighing and measuring articles sold by weight or measure in the market hall and markets.

Sect. 38 gave similar powers as to places for weighing waggons, carts or carriages, laden or unladen.

Sect. 39 enacted that it should be lawful for the council from time to time to demand and take from any person occupying or using any stand, stall, shed, pen or place in the market hall, or in any market, market place, or place for holding any market or fair already established or provided, or to be thereafter established or provided, or bringing into any such market hall, market place or fair, any provisions, agricultural produce, or other marketable commodities specified in Schedule B., such stallages, rents and tolls as the council should from time to time appoint, not exceeding the several stallages, &c., specified in the said schedule.

Sect. 40 gave a similar power to demand stallages, rents and tolls for cattle and live stock, not exceeding the amounts specified in Schedule C.

Sect. 41 empowered the council to take stallages, rent and tolls, at fairs, not exceeding the amounts mentioned in Schedule B.

Sect. 42 enabled the person appointed to attend the weighing houses or places mentioned in sect. 36, to demand such tolls as the council should from time to time appoint, not exceeding the amounts mentioned in Schedule D.

Sect. 43 contained a similar provision with reference to the person attending the machines for weighing waggons, carts and carriages, the charges not to exceed the amounts mentioned in Schedule E.

Sect. 48 obliged every person selling commodities in the market to have them weighed or measured by the weights, measures, or scales provided by the corporation if the buyer required it.

Sect. 53 prohibited all persons from exhibiting or exposing to sale on any market or fair day, or on any other day, in any of the streets within the borough, any marketable commodity, or any cattle or live stock, or any coal, hay, straw, lime or limestone: Provided that nothing therein contained should extend to prevent any inhabitant of the borough, except as therein provided, from selling any marketable commodity in his private dwelling-house

C. A. 1882

MAYOR, &C., OF MANCHESTER v. LYONS.

or shop in any part of the borough, or to prevent any person from hawking for sale in baskets carried by hand any marketable commodity, nor to prevent any licensed hawker from hawking goods for sale.

Sect. 55 provided that "It shall be lawful for the council when and as often as they shall think fit, to alter and change the days, times, and places for holding all or any of the present or future markets or fairs within the borough, as they shall deem necessary or expedient, and to appoint such days, times, and places for holding the same as they shall think fit."

By sect. 65, after reciting that it was at present unlawful for any person to carry on the trade of a butcher or fishmonger in any part of the township of *Manchester*, except in such places as were specially appointed for the purpose, it was enacted that the council might grant to any person a license authorizing him to carry on the trade of a butcher or fishmonger in any part of the township. By sect. 67 every such license was to be for one year only, and sect. 69 enabled the council to charge any sum not exceeding £10 for a license.

By sect. 76 it was enacted that an account should be kept of all moneys paid by the council in the purchase of the manorial property, and in the purchase of land for and in the erection of new, or the enlargement of existing markets, or in the maintenance and repairs of the same, and also of all moneys received by the council for stallages, rents, tolls and duties under the Act; and that as soon as a sufficient amount should have been received to pay off the above expenditure with interest, the power to prevent persons from selling butcher's meat and fish, except in the markets, and the above power to grant licenses to sell butcher's meat and fish in other places than the markets, should cease.

By sect. 126 it was among other things provided that none of the provisions of the Act should be construed to extend the manorial rights of the manor of *Manchester* beyond the district in which they might be or were then lawfully exercised, or to abridge or prejudice any rights or privileges then belonging to or exercised by the devisees of the Duke of *Bridgwater*, or any other person, to sell in open market or otherwise within the

township of *Hulme*, free from tolls, stallages, or other charges, any marketable commodities usually sold in open market.

The amounts of the tolls which the Act empowered the corporation to charge were larger than the old accustomed tolls.

Among the articles specified in Schedule B. were eggs and cured fish, and the council appointed tolls to be paid on them.

The principal market of the corporation was within the manor, and was known as the *Smithfield Market*. It was a market existing at the time of the passing of the Act of 1846, and had since been extended. It was a daily market for the sale of eggs, cured fish, and various other articles of the kinds specified in Schedule B. The business carried on there was principally wholesale. A portion of the market, abutting upon and opening into a street called *Oak Street*, was set apart for the sale of eggs and cured fish, and it appeared that at the busier seasons of the year the market for these commodities spread out into *Oak Street* through the entrance which led from *Oak Street* into the market.

The Defendants carried on business as Irish and foreign produce merchants, importers of butter and eggs, cheese and bacon factors and fish curers, at a shop forming part of a house in *Oak Street*. This shop opened on *Oak Street*, not on the market, being on the opposite side of the street from the entrance to the market. It was not opposite to the entrance; but when the market overflowed at busy times as mentioned above buying and selling went on in *Oak Street* in front of the Defendants' shop. The goods they sold were their own, and were sold in the ordinary course of business.

The corporation commenced this action against the Defendants, alleging by their statement of claim that the business of the Defendants in eggs and cured fish was in fact a market business, carried on in direct competition with the Plaintiffs' market, and that by the proximity of the Defendants' premises to the Plaintiffs' market the Defendants took advantage of the concourse of buyers attending the Plaintiffs' market to solicit and obtain custom for their business, and that by evading the tolls payable to the Plaintiffs within their market the Defendants were enabled to and did in fact undersell and forestall the salesmen and dealers who were tenants of the Plaintiffs in their market and paid tolls

C. A. 1882

MAYOR, &C., OF MANCHESTER v. LYONS.

on their sales. They further alleged that the Defendants' business in eggs and cured fish was a nuisance to and a disturbance of the Plaintiffs' market, and an infringement of and a fraud upon the exclusive right of the Plaintiffs of holding markets within the manor or city of *Manchester*. The statement of claim asked for a declaration in accordance with the last allegation, and for an injunction to restrain the Defendants from carrying on at their said premises or elsewhere within the said manor or city, to the injury of the Plaintiffs, the business of wholesale dealers in eggs and cured fish, or any business which might be a nuisance to or a disturbance of the markets of the Plaintiffs or an infringement of or a fraud upon the market rights of the Plaintiffs, and for an account, damages, and further relief.

In a previous case of the *Corporation of Manchester* v. *Peverley, Blakey, and Others*, Vice-Chancellor *Little* on the 24th of April, 1876, decided (1) that the Act of 1846 operated to extinguish the

(1) April 24, 1876.

LITTLE, V.C.:—

Upon the question whether this Act of 1846 operated to extinguish the prior manorial franchise in respect of markets and fairs, depending as it did on the law of prescription merely, I have arrived at the conclusion that it did so, and upon several concurring grounds which go to the support of that conclusion. In the first place a franchise-right to a market or fair with the tolls belonging thereto, imports a holding by the owner of the right under the Crown, either upon foot of an extant charter or by prescription which assumes the former existence of such a charter, and such a right of market is in its very nature an exclusive right, and one which imports not merely a title in the grantee to enjoy the benefits conferred upon him by the grant under which he claims title, but also a correlative obligation to provide proper accommodation for the market, and for its due regulation, and the grant is held by the grantee subject to an implied liability to its being recalled by the Crown, by proceedings by *scire facias*, in case of his failure to properly discharge its accompanying obligations. But if after such a grant has been made by the Crown the three estates which conjointly constitute parliament step in, whether on the solicitation of the grantee or otherwise, and by their joint act create the same rights or larger or different rights of the same nature and character in favour of the grantee, it seems to me that of necessity these parliamentary rights, emanating as they do from a paramount authority, must supersede those which the grantee was previously holding from the Crown alone, and that after the passing of such an Act there can be no continuing tenure by the grantee under his original title, nor a continuance of his prior accountability on foot thereof to the Crown.

Now that this is the true state of the case is, I think, distinctly shewn by the answer given by the Judges

prior manorial franchise in respect of markets and fairs, but held that the acts of the Defendants which were complained of in that

(through Mr. Justice *Littledale*) to the first of the questions put to them by the House of Lords, when they were secondly consulted by the House in the *Islington Market Bill* (3 Cl. & F. 513), also reported in the notes to the *Mayor of Macclesfield* v. *Chapman* (12 M. & W. 20). The opinions of the learned Judges expressed in that case expressly go to this, that upon a Crown grant of market rights confirmed by Act of Parliament, the grantee is not accountable to the Crown upon a proceeding by *scire facias*, but that if occasion shall arise in the general interest for interfering with the grantee's charter rights as confirmed to him by Parliament, "An application must be made to Parliament to repeal that Act which has embraced and confirmed the charter." Now it appears to me that the position of the Plaintiffs in respect of their franchise rights is such as is above indicated. It is true that the Plaintiffs held their franchise rights not under a still extant charter, but by a prescriptive title based upon the assumption of the previous existence of such a charter. Then they have obtained by the Act of 1846 a parliamentary grant which invests them (as I think) with larger and better rights, and whether so or not, certainly with different rights of holding markets and fairs, and of levying tolls and stallages in respect thereof from those which they previously held by prescription, and with rights which, I think, it would be repugnant to the proper construction of this particular Act of Parliament to hold were intended by Parliament to have concurrent co-existence with those previously existing rights by prescription. I think, therefore, that the franchise rights have been superseded by the parliamentary rights upon the ground just now stated.

Again, there is another view of the position of the Plaintiffs in respect of the operation of the Act of 1846 on their franchise rights. They, themselves, solicited and obtained this Act, and it is not denied, at all events I think that it cannot be effectually denied, that the Act contained provisions covering or relating to every right and every duty incident to the original markets by franchise. The question then arises, can the Plaintiffs, having solicited and obtained this Act of Parliament, now fall back upon and assert the continuance of their original franchise rights? And it seems to me that the ruling of *Wood*, V.C., in the case of *Ellis* v. *Corporation of Bridgnorth* (2 J. & H. 67), is distinctly in point against their being able to do so.

That case, so far as respects the point to which I am addressing myself, stood thus. The corporation were the owners of an ancient market, and in that right they had by common law the power to remove their market from one part of the borough to another at their own pleasure. The borough was, in recent times, brought under the operation of the *Public Health Act*, 1848, and of the *Local Government Act*, 1858, by the competent proceedings for those purposes. One of the results of these proceedings was to give statutory powers to the corporation in their character of the local board acting under the Acts which I have mentioned, and under the powers of the *Markets and Fairs Clauses Consolidation Act* incorporated therewith, to provide markets in the borough, and

C. A. 1882

MAYOR, &C., OF MANCHESTER v. LYONS.

case amounted to the setting up of a private market, which was an infringement of the rights of the corporation under the Act of

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to levy tolls and to make by-laws for the regulation of such markets, subject, as respects the tolls and the by-laws, to the approval or allowance of a Secretary of State. The corporation then made arrangements to remove their market to a new site within the borough, and gave notice of an application to the Secretary of State for the allowance of by-laws framed for the regulation of their new market. The Plaintiffs in the suit claimed to be entitled to object to the removal of the market upon grounds derived out of the provisions of the Acts of Parliament under which the corporation were acting as a local board. The corporation then insisted that the right of removal of their market was a right incident to the exercise of their old common law franchise. But the Vice-Chancellor overruled this contention in these terms. He said "The corporation in fact have been exercising as a local board powers which, as a corporation, they did not possess. Having chosen to avail themselves of the powers conferred by the *Local Government Act* for special purposes which far exceed any that they had as owners, they must be regarded as acting simply as a local board, and cannot fall back on their common law rights as corporate owners of the soil."

Now, that ruling seems to be strictly applicable to the position of the Plaintiffs in this cause, considered with reference to their having been the promoters of the Act of 1846, and as having, by procuring the passing of that Act, disabled themselves from now falling back upon what may have been their former market rights by franchise at common law.

But beyond thus construing this Act of 1846, as I do with the aid of the lights afforded by the previous history of the market franchise, I think it is a just inference that the purpose which this Act fulfils is that of an Act to alter and amend, and at the same time to codify the law as it was intended by Parliament that it should thereafter exist and have operation in reference to markets and fairs, not merely within the township of *Manchester* but within the borough of *Manchester* also; and I think that this measure of legislation was dictated as well with a view to the prevention of further contests or the renewal of old disputes between the Plaintiffs and the limited class of the inhabitants of the township of *Manchester* who were within the scope of the old franchise rights, as also with a view to the interests of that much larger class of persons who constituted the inhabitants of the municipal borough, and indeed with a still more extensive view to the interests of those members of the public at large who might be so circumstanced as to be able to avail themselves of the benefit of the enlarged scheme of market provision intended to be brought into operation under the Act. It is, perhaps, almost superfluous to me to guard myself against being supposed to have laid down any such rule of construction as this, that whenever there has been a grant from the Crown of charter rights, and Parliament shall subsequently have intervened for some subordinate purpose, auxiliary to and which presupposes the continuing existence of those charter rights, such intervention must necessarily be held to have merged or extinguished the tenure of the charter rights from the Crown, or

1846, and ought to be restrained by injunction. Vice-Chancellor *Bristowe* in the present case held himself bound by the decision

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the accountability of the grantee of them to the Crown, upon the footing of that continuing tenure. If, for instance, the object of the Act of Parliament shall have been more clearly to define what the charter rights were, or to provide some auxiliary remedy for their enforcement, the Act, no doubt, may well be construed as not at all interfering with the continuing existence, and the unchanged character in point of law, of the charter rights, or with the continuing liability of the grantee as holding those rights by franchise under the Crown, and more especially would this be the case if the Act were guarded by a clause declaring that the provisions contained in it should not prejudice the grantees' rights under the royal grant. An instance of legislation of that description is supplied by the Act relating to the Duke of *Bedford's* right to claim tolls on sales of fruit and flowers and of vegetable produce made in *Covent Garden Market*, the provisions of which Act are stated in the report of the case of the *Duke of Bedford* v. *Emmett* (3 B. & Ald. 366). The market was granted by King *Charles* II. by charter to the then Earl of *Bedford*, the ancestor of the Duke. It was expressed in the charter that the market was granted, together with all tolls, stallages, and profits to the market belonging, or with the same usually enjoyed. But the charter did not give any specific toll. Then questions arose between the Duke and the persons using the market, upon the legal effect of the charter considered with reference to its not having contained any specific grant of tolls, and also considered with reference to its being (in legal contemplation) a modern charter. After considerable disputes on this subject the Act of 53 Geo. 3, c. 71, was passed. It recited the charter, and further, that it was expedient that further provisions should be made for the better regulating of the market, and for the more easy collection and recovery of the tolls and dues payable in the market, then (stating the scope of the enacting clauses very shortly) it was enacted that it should be lawful for the owner of the market to take from all sellers of fruit, flowers, vegetables, &c., in the market, all such tolls as were usually collected within the market, and that no tolls should be payable by buyers within the market unless they should resell in the market. Then by sect. 8 it was enacted that the Act should not affect the title of the Duke to stallage or to any other property belonging to the market. The Court put this construction upon the Act, that it was intended to put at rest all questions of law arising upon the original rights to toll under the charter, and to do this by making the proof of the usage of the market at the date of the Act conclusive evidence of the right, and also conclusive that the toll was payable by the seller and not by the buyer, and to affix those characteristics upon the Duke's rights under the charter, and so qualified to leave those rights subsisting as charter rights. Accordingly, in the subsequent case of *Prince* v. *Lewis* (5 B. & C. 363), the rights of the Duke against an alleged infringer of his grace's charter rights were dealt with by the Court on the footing of the general infringement of market rights held under a Crown grant, and without any suggestion that the legislation, in reference to them, had at all

C. A. 1882

MAYOR, &C., OF MANCHESTER v. LYONS.

of his predecessor that the Plaintiffs could not claim by prescription, with which decision he expressed his entire concurrence; and also held that what the Defendants were doing was no infringement of the rights of the corporation under the Act of 1846.

The corporation appealed, and the appeal was heard on the 25th and 27th of November.

Benjamin, Q.C., *Gully*, Q.C., and *Maberly*, for the Appellants:—

We contend, first, that the corporation retains the old manorial rights which have existed from time immemorial, in addition to such rights as are given them by the statute.

Secondly, that by the old manorial right, they are entitled to

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altered their nature, considered as franchises held from the Crown. But there is a radical distinction between the operation of an Act of Parliament couched in the terms in which the Act applicable to *Covent Garden Market* was expressed, and those which we find contained in the Act of 1846, as applied to the Plaintiffs' exclusive rights in respect of the *Manchester* markets. But, now, upon the argument of this case it was urged by the Plaintiffs' counsel that even if it were true that the Act of Parliament had referred the rights of the holding of the markets and fairs, and those of receiving tolls in respect thereof, from a tenure under the Crown to one under Parliament itself, still that at all events there were no words in the Act distinctly merging or abolishing the franchise rights, and they therefore concluded that it is possible to hold that the franchise rights still subsisted, if for no other purpose still for the purpose of supporting against invasion the new statutory rights which Parliament had granted to the Plaintiffs in these matters. But I think that this line of argument will not bear the test of examination. If Parliament has appropriated to itself the holding as from itself of the rights of market as newly constituted by enactment, and also the holding as from itself of the rights to receive tolls and stallage in respect of those statutory markets as so constituted, what is there left subsisting of the ancient franchise capable of being held under the Crown? It is in my opinion clear that the answer to this question must be "nothing," for the rights to the holding of the markets, and to the receipt of tolls in respect of those markets were not merely incidents of the holding under the royal franchise, but were in truth the sole constituent elements of that franchise. I therefore arrive at the conclusion, and I hold, that the franchise rights were superseded or extinguished on the passing of the Act of 1846, and that whatever rights do now exist in the Plaintiffs in respect of markets and fairs must be asserted on the footing of their parliamentary title.

tolls on eggs and dried fish sold in shops—indeed to tolls on all marketable articles. The market originally was held only on Saturday, but by degrees it was extended to all other days of the week except Sunday. The extent of the manorial rights in the reign of *Edward* III. is shewn by an inquisition by the Duke of *Lancaster*, in the year 1360.

[*Ambrose*, Q.C., for the Respondents, objected to the admission of the document as evidence. It was not a public document. It was before the Duchy of *Lancaster* became vested in the Crown. The Duke was lord paramount of the manor. The inquisition was simply an inquiry by one of the parties interested as to his rights.

JESSEL, M.R.:—I have looked at the inquisition. The Duke of *Lancaster* had sovereign rights at the time in the Duchy. The inquisition is directed to three of the justices of the Duke, and is said to be sent "into our Chancery."

Ambrose withdrew the objection.]

There is nothing inconsistent in the rights granted by the *Manchester Market Act*, 1846, with the old manorial rights; and there is therefore no reason why they should not exist together. The object of the statute was to confirm the old rights and to extend the area of their operation. This is shewn by the preamble and by a comparison of the different clauses of the Act. This view is supported by the cases as to *Covent Garden Market: Duke of Bedford* v. *Emmett* (1) and *Prince* v. *Lewis* (2) (*Attorney-General* v. *Mayor of Cambridge* (3), and *Re Islington Market Bill* (4), were also referred to). The *Mayor of Dorchester* v. *Ensor* (5) shews that the statutory adding a new district does not take away an old franchise.

[JESSEL, M.R.:—In my opinion it decides no point of the kind, it only decided that Parliament had enlarged the limits of an old franchise, the intention to keep that franchise alive being clear.]

(1) 3 B. & Ald. 366.
(2) 5 B. & C. 363.
(3) Law Rep. 6 H. L. 303.
(4) 3 Cl. & F. 513.
(5) Law Rep. 4 Ex. 335.

C. A. 1882

MAYOR, &C., OF MANCHESTER v. LYONS.

In *Mayor of Penryn* v. *Best* (1), a change of day was held not to take away the old franchise.

[JESSEL, M.R.:—In that case a charter altering the day was presumed to have been lost. Here there can be no such presumption, for your predecessors in title claimed a Saturday market after 1790, and no charters can be presumed to have been lost at so recent a period.]

Then, assuming the old franchise to exist, the evidence as to the extent of the rights conferred by it has to be considered.

[JESSEL, M.R.:—We are all of opinion that the old franchise does not exist, and will give our reasons hereafter. This evidence therefore need not be gone into.]

Then upon the question whether the acts of the Defendants are a disturbance of the Plaintiffs' statutory market, the principle for which we contend is that no one can come and take the benefit of a market without paying toll. No case decides that if a man takes a shop which looks out upon a market, and gets the market customers to come to him, he can avoid toll. Here the Defendants take a shop in *Oak Street*, which forms a side of one of the old markets. The concurrence of buyers and sellers extends into the street opposite to the Defendants' shop, and buying and selling take place in front of it. It is decided by *Corporation of London* v. *Low* (2) that it is not necessary to disturbance of a market that a rival market should be set up. In *Bridgland* v. *Shapter* (3) it was decided that toll must be paid for goods sold in a shop, but bargained for in the market. The case proceeds on the principle that the benefit of the market cannot be taken without paying toll. Selling close to a market is a fraud on the market: *Bridgland* v. *Shapter*; *Mayor of Brecon* v. *Edwards* (4). The Vice-Chancellor relied on *Mayor of Macclesfield* v. *Chapman* (5), but the claim there was not to prevent a person from getting the benefit of the market, but to shut up all the butchers' shops in *Macclesfield* on market day, and the general principle for which we contend was there admitted. A single person who sells

(1) 3 Ex. D. 292.
(2) 49 L. J. (Q.B.) 144.
(3) 5 M. & W. 375.
(4) 31 L. J. (Ex.) 368.
(5) 12 M. & W. 18.

so close to the market as to draw away customers from it, is disturbing the market, it not being necessary to create such disturbance that a number of people should be concerned so as to make a rival market.

Ambrose, Q.C., *Clare*, and *E. Jones*, *contrà*, were not called upon.

JESSEL, M.R. :—

There are two totally distinct points arising on this appeal. The first is whether an ancient franchise formerly belonging to the lords of the manor of *Manchester* to hold a market, is still an existing franchise belonging to the corporation of *Manchester*, or whether it has been extinguished by virtue of a Markets Act obtained by that corporation. The second question is whether, assuming this Court to be of opinion that the franchise has been extinguished, and that the only markets belonging to the corporation are the markets which they are empowered to hold by their Markets Act, the Defendants have committed any disturbance of those markets for which they are liable to be sued.

The first point was decided against the corporation by Vice-Chancellor *Little* in a case of the *Corporation of Manchester* v. *Peverley and Others*, in the year 1876. In the present action his successor, Vice-Chancellor *Bristowe*, properly held that he was bound by that judgment, but he also expressed his concurrence in it. Therefore we have both Vice-Chancellors of opinion that the ancient franchise had ceased to exist.

I think I may quote, as an accurate statement of the law on this subject, what was said by Vice-Chancellor *Little* in his judgment in *Peverley's Case* (1). After speaking of a franchise right to a market as importing a holding of the right under the Crown, either by extant charter, or by prescription which presumes the former existence of such a charter, and referring to the liability of the grantee to have the grant recalled if he did not discharge its obligations, he says : " If after such a grant has been made by the Crown the three estates which conjointly constitute Parliament step in, whether on the solicitation of the grantee or otherwise, and by their joint act create the same rights or larger or different

(1) *Ante*, p. 294.

C. A. 1882 MAYOR, &c., OF MANCHESTER v. LYONS. Jessel, M.R.

rights of the same nature and character in favour of the grantee, it seems to me that of necessity these parliamentary rights, emanating as they do from a paramount authority, must supersede those which the grantee was previously holding from the Crown alone, and that after the passing of such an Act there can be no continuing tenure by the grantee under his original title, nor a continuance of his prior accountability on foot thereof to the Crown."

Now that being so, it only remains to consider whether by the *Manchester Markets Act* there was created such a grant of market or markets to the corporation as shewed that the old markets no longer existed, and that the corporation must rely solely on the *Markets Act* for its markets.

The history of the matter is very simple. It seems that the manor of *Manchester* was co-terminous with the township of *Manchester*, which appears to be the largest and most important of the six townships which constitute the borough, now the city, of *Manchester*. That manor had, no doubt, from the Crown a grant of a right of markets; what it was exactly it is rather difficult to say, because the grant is lost, but there is evidence, and, to my mind, sufficient evidence, to shew that the original grant was of a Saturday market.

In the first place, we have an inquisition in the time of *John of Gaunt*, the first Duke of *Lancaster*, in the ninth year of his dukedom, which says that the lords of the soil are entitled to take tolls "as well on every day of the week as on market day," which is evidence that there was a market day, though it does not shew what day it was.

Then in the next place we have three records towards the end of the last century in actions brought by the then lord of the manor, and in every one of them he states the market day to be the Saturday. This is strong evidence to shew that there was a Saturday market day. There is no evidence the other way except this, that in the year 1827 a successor in title brought an action alleging, not that the general market was held on any other day than the Saturday, but that the fish market was held on Tuesdays, Thursdays, and Saturdays. Taking that to be established, it only amounts to this, that there was a fish market on Tuesday,

Thursday, and Saturday, but there is nothing to shew that there was a general market on any day but Saturday.

Then the Act 7 & 8 Vict. c. xl., was passed which enabled the corporation to buy the market from the lord of the manor, and the corporation did so. At the time of the passing of the *Markets Act*, 9 & 10 Vict. c. ccxix., the corporation of *Manchester* were the owners of the manorial market. There is some question as to what the extent of the franchise was, but the lord of the manor had established this, that by prescription he had a right to prevent fishmongers and butchers from selling in their shops on market days. Beyond that it does not appear that he had established any right by prescription to compel anybody who had a shop within the township of *Manchester* to refrain from selling his own goods in his own shop on market days. That being the position of matters, we have an Act passed, the title of which is not without some significance: "An Act for providing Market Places and for regulating the Markets and Fairs in the Borough of *Manchester* in the County Palatine of *Lancaster*," not in the township but in the borough.

Then, after reciting some prior Acts of Parliament and the purchase of the manorial rights, it recites: [His Lordship here read the recital which is given above].

Then sect. 4 gives power to the council of the borough (I read "council" throughout as being used merely for the executive of the corporation, and I do not consider that the effect of the Act is different from what it would have been if the word "corporation" had been used), to buy any lands, houses, or buildings within the borough for the purposes of the Act. They are empowered by the 24th section to erect a new market hall for the sale of fish, meat, provisions, and agricultural produce, &c. Then the 25th section gives them power after the new market hall and the buildings connected therewith have been completed and opened for public use, to hold and keep a market therein on such days in every week as they shall from time to time appoint, and to allow such marketable commodities as they shall think fit to be exposed for sale and sold therein. Then there is a provision in sect. 26 to enable them to use other places until their market hall is completed. Sect. 27 empowers them to enlarge all or any

C. A. 1882 MAYOR, &c., OF MANCHESTER v. LYONS. Jessel, M.R.

of the present market places, or in lieu thereof, or in addition thereto, to make new ones for the sale of market commodities. The 28th section has a similar provision with regards to cattle markets, and the 29th contains a provision as to the tolls in the cattle markets. Sect. 30 enables the council to discontinue old markets when they have made new ones. The 32nd section enables them to provide markets for the sale of hay and straw. Sect. 33 enables them to provide eligible sites for market places, and sect. 33 as well as sect. 27 enables these sites to be provided either from any land then belonging to the corporation or any land they may acquire. As I understand they had land without the township of *Manchester*, and within the borough, but they had no land except within the borough at the passing of the Act. So it comes to this, that the effect of those two sections is that they may establish their markets in any part of the borough they may think fit, whether they are within the township of *Manchester* or not. Then the 36th section contains a provision for establishing modes of weighing and measuring things used in the market, and the 38th section has similar provisions as to weighing carts and carriages. Then the 39th section gives them power to take tolls not exceeding those mentioned in Schedule B, which, as I understand, are larger tolls than they could take before. The 40th section gives a similar power of taking tolls for the cattle market. The 42nd section gives entirely new tolls for weighing machines, and the 43rd section does the same thing for weighing carts. I think that there is no other clause to which I need refer. Reference was made to the saving clause, but I do not consider that a saving clause can be properly looked at for the purpose of extending an enactment, and the 126th section, when examined, comes only to this, that nothing in the Act shall extend the manorial rights beyond the township of *Manchester*. Then there are some very curious provisions as regards butchers and fishmongers. As I said the lord of the manor had established a right to prevent their keeping their shops open on market days, and the new legislation instead of that provides that they may do it on obtaining a license for which they have to pay a certain sum of money, and then it goes on to provide that when the money that the corporation of *Manchester* has spent in the purchase of

the manorial rights, and the erecting and repairing the markets has been repaid, then the licenses shall cease, and the butchers and fishmongers shall no longer be restrained from selling in their own shops instead of in the market.

Now what is the effect of those sections? First of all, the day of the market is changed. Whether it was one day or three days a week for fish, is immaterial. It was one day a week for everything else, and now it may be on any day or days in the week which the council appoint. This is a very strong circumstance to shew that what the corporation have is a new market and not a mere extension of the old one.

The next matter of observation is that not only is the day changed, but the place may be changed. The old manorial market must, of necessity, have been situate within the township of *Manchester*, and could not have been taken outside the limits. Under the new statute, all the new markets may be (though considering the importance of the provisioning of the township of *Manchester*, it is not likely that they ever will be), outside that township. The market then may be changed in time and changed in place. But that is not all. In addition to the change of time and place there is a change of charge. Of course, everybody is entitled to use an old market on payment of the accustomed toll, but under the Act there is a power to charge more. In addition to that, there are charges imposed to which people were not formerly liable at all, viz., the charges in relation to weighing machines, therefore there is not only a power to change the old toll, but there is also an imposition of an entirely new set of tolls. Then, to crown the whole, the new market instead of being a market for the inhabitants of a particular township is to be a market for the whole borough. This lets in a new class who are entitled to use the market. The old customers of the market, the inhabitants of the township, had a right to use the old market; but now a market place is erected which all the inhabitants of the borough, including the inhabitants of the six townships, have a right to use. So that almost everything is changed that it is possible to change. I can hardly imagine a plainer case of a new market as distinguished from a mere alteration or enlargement of an old one. It appears to me perfectly plain that, applying the

C. A. 1882

MAYOR, &C., OF MANCHESTER v. LYONS.

Jessel, M.R.

law as laid down, and in my opinion correctly laid down, by Vice-Chancellor *Little*, there is a new market which is intended to be a new market, or rather a series of new markets, and that the old franchise was intended to be extinguished. It was bought by the corporation and was intended to be put an end to in consideration of totally different privileges granted to the corporation by the Act in question. That concludes all I have to say on the first point.

The question we have then to consider is, whether the Defendants are liable for disturbance of the Plaintiffs' market. The facts necessary to be stated are very few. The Defendants are the owners of a shop which is used by them for the sale of (among other things) dried fish and eggs. It is material to consider where the shop is. It is in *Oak Street*. It is not opposite to the entrance of the market, which is higher up the street, but is opposite to some private houses belonging to the corporation. The shop opens on the street, and does not open on the market. If we had given to the market the signification attempted to be put upon it by the counsel for the Appellants, it would include the whole street which leads up to the market. In my opinion that is not a fair definition of the market. The market is the proper market, and the fact that some persons improperly sell provisions in the street outside does not extend the market.

What is the position of the Respondents? They sell both wholesale and retail in the ordinary course of business dried fish and eggs which belong to themselves. They sell them on market days as well as on other days, and that is alleged to be a disturbance of the market. It may be a disturbance of the market in this sense, that if they were to shut up their shop more people would go to the market on market days and more business might be done in the market, but that does not appear to me to have much bearing on the question. What amounts to a disturbance of a market must, of course, depend on the facts of the case, and I am not going to lay down that a man's selling goods in a shop may not be a disturbance of a market. I do not think it is necessary to consider that point on the present occasion, and I do not wish to lay down anything which may be called a definition of disturbance of a market, because a Judge in laying down such

a definition is in danger of framing it so as not to include some device which has not occurred to him, and which would be a disturbance of the market, and then that definition may be cited as an authority for not allowing an action to lie against such a disturbance. It has been held more than once in modern times, whatever may have been the case in former days, that as an ordinary rule the sale of a man's own goods in the regular and ordinary course of business in his own shop is not a disturbance of a market, and that something more must be shewn to make it a disturbance. How much more will be sufficient it is not for me now to say. In the present case I can find no evidence whatever of disturbance beyond the mere fact that the Defendants sell their own goods in the ordinary course of business in their own shop. In my opinion that does not amount to a disturbance of the market, and the appeal must be dismissed.

COTTON, L.J.:—

The first question is whether the Plaintiffs are entitled to rely on the ancient franchise. I agree with the Master of the Rolls that they are not, and I should not add a word to what he has said on this subject were it not that the question is one of importance. In every such case it is a question to be determined by a consideration of the whole of the Act whether the rights given by the Act are intended to supersede the rights which previously existed. What I principally rely upon here is that the right given by the Act to the corporation is a right to hold markets not only in the comparatively small area over which their ancient franchise extended, but a right to hold markets in any part of the borough of *Manchester*. The former right which the corporation allege to be still subsisting was a right belonging to the lord of the manor as regards the township, and not extending beyond it, which right had been purchased by the corporation under a former Act, but the rights intended to be given to them by the Act of 1846 were rights not only for the benefit of the borough but rights which they might exercise throughout the borough. The heading and recital of that Act have been referred to by the Master of the Rolls, and not only do we find that it imposes no limit as to the place where the new markets are to be erected,

C. A. 1882

MAYOR, &C., OF MANCHESTER v. LYONS.

Cotton, L.J.

except that it is to be on the land of the corporation or on land to be acquired by them, which land to be acquired is, I think, limited to the borough, but we find other sections in the Act which point to what is to be done as being coterminous with the borough, and not only for the benefit of the borough. Thus sect. 55 says "that it shall be lawful for the council, when and as often as they think fit, to alter and change the days, times, and places for holding all or any of the present or future markets or fairs within the borough as they shall deem necessary or expedient." That is a power given to them in express terms throughout the borough, and not in any way confined to the township to which alone the previous franchise extended. That and other clauses lead clearly to the conclusion that the intention of the Act was to grant powers as regards holding markets and regulating them not only in the township but throughout the whole of the borough. The 126th section (the saving clause) might at first seem to afford an argument in favour of the corporation, but I agree with the Master of the Rolls that a mere saving clause is not to give a new effect or a different effect to the previous sections in the Act. It must also be remembered that the manorial rights which were purchased were not only this right of holding a market but other rights, and although the first part of sect. 126 provides that the Act shall not extend the manorial rights beyond the original district, and so treats them as still existing, this enactment may have been inserted *ex abundanté cautelâ*; and at all events it could have no effect in extending those rights or confirming the old franchise. The latter part of the saving clause, if any effect is given to it, is against the corporation, because it says that the Act shall not prejudice the rights of the Duke of *Bridgwater's* devisees as regards holding markets in the township of *Hulme*, one of the townships in the borough. If the market rights were not intended to extend throughout all the borough, I think that saving clause would hardly have been introduced. I come, then, to this conclusion, that the large powers given by the Act as regards markets were intended to be coterminous with the borough, and that Parliament has given to the corporation, on their application, rights extending over a much larger area than, and in some respects different from, the rights conferred by the old

franchise, and that the old right which the corporation had bought was superseded by these new and more extensive powers.

The case is entirely different and distinct from those referred to on behalf of the Appellants. The case of the *Mayor of Dorchester* v. *Ensor* (1) was simply this, there being a grant to the corporation of a right to hold a market in the borough, when the limits of that borough were extended by Act of Parliament it was held that the limits within which the market could be held were also extended, as if the Act had said in terms "what is hereby added to the limits of the borough shall for all purposes be part of the borough." The cases relating to *Covent Garden Market* are, in my opinion, in no way inconsistent with our decision. The question in each case turns upon the construction of the statute upon which it arises, and if you find the statute referring to an old franchise as subsisting, and merely varying the powers which the grantee is to have as regards that franchise, then that is not superseding the old franchise, but enabling those who hold it to exercise rights of a larger character than they could have exercised under it. On the construction of this statute I feel no doubt that the old franchise is superseded by the new powers granted by the statute.

As regards the second question, that of disturbance, it is a question of evidence. What was relied upon was this, the dictum that a man cannot take the benefit of a market and evade paying toll. The difficulty of applying that lies in the question, what is taking the benefit of the market? In a sense every one who sells his goods on a market day gets the benefit of a market, owing to the increased number of people who come in from the surrounding country, but that is not taking the benefit of the market for this purpose, since it has been established that unless an old franchise is proved which confers a special right on the owners of the market, shopkeepers are not prevented from selling their goods in their shops on a market day. Here the Defendants are selling their own goods in their shop in the ordinary way of their business. There is not any evidence to shew that under the pretence of carrying on their business they take in the goods of other people and enable them to be sold at the shop, nor that

(1) Law Rep. 4 Ex. 335.

C. A. 1882

MAYOR, &C., OF MANCHESTER v. LYONS.

Cotton, L.J.

they go into the market to solicit people to come out to them, but they merely sell their own goods in their shop in the ordinary way of business. The only point which raises the argument of the corporation is this, that the shop is within a certain distance of the market. I cannot come to the conclusion that simply because this shop is within fifty yards of the entrance to the market, not being in the market nor opposite to the entrance, the mere selling by the Defendants of their goods in their shop in the ordinary way of business is a legal disturbance of the market, although, no doubt, this shop and other similar shops outside the market may attract customers who if those shops were not there would go to the market.

BOWEN, L.J.:—

I agree with all that has been said, and I will only add a very few words. The first point is whether the corporation are in their present proceedings enforcing an old manorial franchise derived in the first instance from the king and bought up by the corporation in the year 1846, or whether they are enforcing something totally distinct from franchise, viz., a parliamentary right created by statute. When there is a franchise created by charter, and the Legislature afterwards operates upon it, it is obvious that the Legislature can do exactly what it pleases. It can either leave the old franchise standing, and place a new parliamentary right beside it, or it may leave the old franchise standing and incorporate certain statutory incidents into the old franchise, provided it makes its intention clear; or it may extinguish the old franchise, either expressly or by implication, and substitute in its place, not a franchise properly so called, but parliamentary rights and obligations as distinct from a franchise. We must therefore in each case look at the statute itself to see what the Legislature has chosen to do, and for that reason I think that no cases can be found exactly in point, because the decided cases have all been decided on different statutes. In the present statute we find a new day, a new place, and new tolls, and instead of a market confined to the manor which was co-extensive with one township, we find a market for the whole borough. There is, therefore, nothing left that has any identity with the old franchise. The

old franchise from the king has disappeared under the Markets Act.

Then with regard to the second point, which is a simple question of evidence, what we have to decide is whether the fact of a man's being an ordinary dealer in a shop close to the limits of the market is, when it stands alone, evidence of a disturbance of the market. There is no case that so decides. It is said by *Littledale*, J., in *Mayor of Macclesfield* v. *Pedley* (1), and his remarks are supported by the language of Baron *Parke* and Lord *Abinger* in *Mayor of Macclesfield* v. *Chapman* (2), that there is no case which has decided that the mere selling in a private shop not within the limits of a market place, marketable articles on market days, is an injury to the market in point of law. There is no doubt an older case, *The Prior of Dunstable's Case* (3), which was supposed to have gone to that length, but it was pointed out many years ago that it established nothing of the kind.

Without attempting to define what evidence would suffice to establish disturbance of the market, it is sufficient to say that there is not enough here to establish it.

Solicitor for Plaintiffs: *R. Freer Austin*, agent for *W. H. Talbot*, *Manchester*.

Solicitor for Defendants: *James J. Lambert*, *Manchester*.

(1) 4 B. & Ad. 397. (2) 12 M. & W. 18.
(3) Year Book, 11 Hen. VI. pl. 13.

H. C. J.

C. A.
1882
Nov. 30.

Ex parte JACOBSON. *In re* PINCOFFS.

Debtor's Summons—Security—Solvent Debtor—Bonâ fide Dispute as to Debt—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), s. 7—*Right of Respondent to insist on having his Evidence heard.*

Proceedings on a debtor's summons, pending the trial of an action for the debt, will not necessarily be stayed without security, though the alleged debtor is solvent and there is a *bonâ fide* dispute as to the debt. The probability of success in the action is one element to be considered.

If a Judge of first instance is prepared to decide in favour of a defendant or respondent without hearing his evidence, his counsel is entitled to insist that the evidence shall be heard before the decision is given.

If, however, the counsel does not exercise that right, but accepts the decision in his favour on his opponent's evidence, the Court of Appeal has still power to allow the evidence to be taken before reversing the decision.

Ex parte Sewell (1) explained.

THIS was an appeal from the dismissal by Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, of a debtor's summons issued by *H. Jacobson* against *F. A. Pincoffs*.

By the summons *Jacobson* claimed the payment of the sum of £1053 11*s.* 2*d.*, being the amount of two promissory notes for £500 each, made by *Pincoffs* in favour of *Simon Phillipart* or order, and dated respectively the 7th of December, 1876, and respectively made payable on the 31st of December, 1879, and the 31st of December, 1880, and indorsed by *Phillipart* to *Jacobson*, together with interest thereon at 5 per cent. per annum, as to one £500 from the 3rd of January, 1880, and as to the other £500 from the 3rd of January, 1881, and amounting to £53 11*s.* 2*d.* The notes had been presented at maturity and dishonoured. *Pincoffs* applied to the Court to dismiss the summons. He denied that he was insolvent, and it was not proved that he was. He also said that *Jacobson* was not a holder of the notes for value, but that they had been indorsed to him as agent for *Phillipart*, in whose employment he had been, and that they remained the property of *Phillipart*. And *Pincoffs* said that *Phillipart* was indebted to him on another account in more than the amount claimed by the summons, and that he was entitled to set off the one claim

(1) 13 Ch. D. 266.

against the other. Evidence was taken on behalf of *Jacobson*, and the Registrar after hearing it said that he did not require to hear any evidence on behalf of *Pincoffs*. The counsel who appeared for him did not request the Registrar to hear the evidence which he was prepared to adduce, and the Registrar made an order dismissing the summons. *Jacobson* appealed.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the Appellant:—

We made out a *primâ facie* case, and the Registrar ought not to have dismissed the summons. He should have stayed the proceedings pending the trial of the validity of the debt, and should have required *Pincoffs* to give security.

Sidney Woolf, for *Pincoffs*:—

Pincoffs is perfectly solvent, and there being a *bonâ fide* dispute as to the debt, a debtor's summons, which is a very oppressive proceeding, ought not to be resorted to: *Ex parte Sewell* (1). Security ought not to be required: *Ex parte Marshall* (2); *Ex parte Wier* (3); *Ex parte Ward* (4). The Registrar did not hear my evidence, and an opportunity should be given to me of adducing it now.

JESSEL, M.R.:—

The law on the subject is well settled. The Respondent is the maker of two promissory notes, for which he received value, and they were afterwards indorsed to the Appellant for value. When they became due they were duly presented for payment and were dishonoured. The notes became due in December, 1879, and December, 1880, and these proceedings were not taken till 1882. Under these circumstances, if there were nothing more, it would be a purely undefended case. But it is said that the Appellant is not a holder of the notes for value, that they were indorsed to him as agent for *Phillipart*, who was his employer, and that they remained the property of *Phillipart*; and the Respondent says that he has, as against *Phillipart*, a defence in the nature of a set-off. The

(1) 13 Ch. D. 266.
(2) 5 Ch. D. 873.
(3) Law Rep. 7 Ch. 319.
(4) 20 Ch. D. 356.

C. A. 1882 *Ex parte* JACOBSON. *In re* PINCOFFS. Jessel, M.R.

Appellant answers that the notes were not indorsed to him as an agent, and he produces a letter which he says proves this. It would not be right for us to say now what is the true construction of that letter; the Appellant's rights depend on it. The question is whether there is a great probability of his success in an action, and I think there is. What then is the law on the subject? It is laid down in *Ex parte Sewell* (1). There there was a *bonâ fide* dispute as to a debt, and the Court was of opinion that there was no reason for doubting the debtor's solvency. And Lord Justice *James* said, "I think the proper order to make will be to stay the proceedings on the summons, on the terms of the Appellant's bringing the sum claimed into Court to abide the result of an action." In that case only a small sum was claimed; when the sum is a large one the practice is to require security, not payment into Court. Lord Justices *Baggallay* and *Thesiger* concurred in that order. It is true Lord Justice *Thesiger* added, "I assent to that only because it appears to be in accordance with the previous decisions of this Court in cases in which the weight of the evidence is in favour of the creditor. But for those decisions I should have thought that the proceedings ought to be stayed unconditionally. Though the creditor may be within his strict right in issuing the summons, yet I think the provisions of the Act were not intended to apply where the debtor is solvent and has a *bonâ fide* defence to the claim." Lord Justice *Thesiger* therefore agreed in the proposed order because he thought he was bound by the previous decisions. That is the law on the subject, and I think it applies exactly to the present case. The order will, therefore, be to stay the proceedings on the summons pending the result of an action, on the terms of the Respondent giving security for the amount claimed.

I wish to add a word or two as to the course which the proceedings took before the Registrar. He was disposed to decide in favour of Mr. *Woolf's* client without hearing the evidence which he was prepared to adduce, and Mr. *Woolf* did not insist on his evidence being heard, but accepted the decision offered him. I do not impute any blame to him. When I was at the Bar I always, in such circumstances, accepted a decision in favour of

(1) 13 Ch. D. 266.

my client, and risked the chance of an appeal. But I was perfectly well aware that I was not bound to do so. It was quite open to Mr. *Woolf* to ask the Registrar to hear his evidence before giving his decision, and it is equally open to this Court now either to hear the evidence itself or to send the case back to the Registrar to take the Respondent's evidence. Therefore, I asked Mr. *Woolf* what was the nature of his evidence, and from what he says I am of opinion that, even if he could prove what he says he is prepared to prove, there would be no ground for making a different order.

COTTON, L.J.:—

I think the order which the Master of the Rolls has mentioned is the right order to make. I will only add that if it appeared to us that the evidence which the Respondent's counsel is prepared to adduce would alter our order, he ought, in my opinion, to have an opportunity of adducing it. But I think the proposed evidence would not affect our order. The question whether security shall be required does not depend solely on the solvency or insolvency of the debtor. If there is a probability of the creditor's success in an action, the solvency of the debtor will not deprive the Court of the power to require him to give security.

BOWEN, L.J.:—

I think the Registrar's order cannot be sustained. It seems to me common sense to say that the creditor ought not, by issuing a debtor's summons, to be allowed to put himself in a better position, or the debtor in a worse position, than if there had been a summons in Chambers under Order XIV. under the *Judicature Act*, 1875. If there had been such an application in the present case, I think the Judge would have said that the Defendant might defend upon giving security. The rules under the *Judicature Act* do not of course afford any guide to the construction of the *Bankruptcy Act*: but the considerations which arise at Chambers under Order XIV. are not unlike those by which the Registrar might reasonably be guided when dealing with the debtor's summons;

C. A. 1882 *Ex parte* JACOBSON. *In re* PINCOFFS.

and I think that justice in the present instance will be done by staying the proceedings upon the summons, on the terms of the Defendants giving security.

JESSEL, M.R. :—

The costs, including those of the appeal, will abide the event.

Solicitors for creditor: *Tibbitts & Son.*
Solicitors for debtor: *Lewis & Lewis.*

W. L. C.

C. A. 1881 CHITTY, J. *Dec.* 6, 15. 1882 *March* 20, 21; *July* 13. C. A. *Dec.* 1.

COMBE *v.* DE LA BERE.

Ecclesiastical Law—Sentence of Deprivation—Jurisdiction—Prohibition—House of Lords—Palace of Westminster—Royal Peculiar—Royal Palace—Royal Residence—Church Discipline Act, 1840 (3 & 4 *Vict. c.* 86) [*Revised Ed. Statutes, vol. viii. p.* 638].

A suit having been brought against a clerk in the Court of Arches, under the *Church Discipline Act*, a sentence of suspension for six months was pronounced against him on the 9th of March, 1878, but was made conditional on an affidavit being filed. Afterwards the affidavit was filed, and an unconditional sentence was pronounced on the 23rd of March and served on the Defendant.

A fresh suit was instituted in 1880 for fresh offences, and also for contumacious disobedience to the sentence of the 23rd of March, 1878. These offences being proved, the Defendant was sentenced to be deprived of his benefice. This sentence was pronounced by the Dean of Arches in Committee Room E of the House of Lords.

A motion for a prohibition having been brought to restrain the Court of Arches from enforcing the sentence :—

Held, first, that the sentence of the 9th of March was an interlocutory order which did not end the suit, and therefore the Court was not *functus officio* when it pronounced the unconditional sentence of suspension :—

Secondly. That even if the unconditional sentence had been void, the Court would not have exceeded its jurisdiction in passing the sentence of deprivation, as there were other offences proved which would have supported it :—

Thirdly. That the site of the old Palace of *Westminster* is no longer a peculiar, but is within the diocese of *London* and the jurisdiction of the Court of Arches :—

Fourthly. That the new Palace of *Westminster* is not exempt from the

jurisdiction of the ordinary Civil and Ecclesiastical Courts on the ground of privilege, inasmuch as it has ceased to be a royal residence :—

Whether Committee Room E of the House of Lords is within the precincts of the old Palace of *Westminster*, *quære*.

IN the year 1874 a suit was instituted against Mr. *De la Bere*, under his then name of *Edwards*, by Mr. *Combe* in the Court of Arches, in pursuance of letters of request from the Bishop of *Gloucester*, for various ritualistic offences against the ecclesiastical canons and laws.

On the 17th of July, 1877, judgment was pronounced in the suit of *Combe* v. *Edwards*, and upon the 9th of March, 1878, a sentence of suspension for six months was pronounced, but was made conditional on a certain affidavit being filed. The affidavit was duly filed on the 15th of March, and on the 23rd of March, 1878, the sentence of suspension was pronounced.

The decree of the 23rd of March, 1878, recited the filing of the affidavit, and decreed suspension unconditionally, but was in all other respects similar to the decree of the 9th of March, 1878.

The suspension was issued on the 29th of March, 1878, but was not enforced.

The suit of *Combe* v. *De la Bere* was instituted in March, 1880, under fresh letters of request from the Bishop of *Gloucester*, under the *Church Discipline Act*, 1840, alleging certain ritualistic offences against Mr. *De la Bere*, and also contumacious disobedience to the previous order of suspension of the 23rd of March, 1878.

Mr. *De la Bere*, though duly cited, did not attend the proceedings in the second suit, and on the 8th of January, 1881, a sentence of deprivation was pronounced in the suit of *Combe* v. *De la Bere*.

The sentence of deprivation was pronounced by Lord *Penzance*, as Judge of the Arches Court, sitting in Committee Room E of the House of Lords.

On the 14th of January, 1881, the Master of the Rolls, before the sentence of deprivation had been acted on, granted a rule *nisi* for a prohibition to Lord *Penzance* and the promoter Mr. *Combe* to restrain them from enforcing the sentence of deprivation of the 8th of January, 1881, and this was a motion to make absolute the

C. A. 1882

COMBE v. DE LA BERE.

rule *nisi* so obtained. The motion came on to be heard before Mr. Justice *Chitty* on the 6th of December, 1881.

Davey, Q.C., *W. G. F. Phillimore*, and *Hornell*, in support of the motion, contended that the sentence of deprivation of the 8th of January, 1881, was void, first, on the ground that it was pronounced for a number of offences, one of them being disobedience of the order of the 23rd of March, 1878, which order it was contended was bad as having been made when the Court was *functus officio*, the order of the 9th of March, 1878, being a final order; and secondly, on the ground that Committee Room E of the House where Lord *Penzance* sat when he pronounced the sentence of deprivation, was exempt from the jurisdiction of the Court of Arches as being a royal residence, and so exempt from the Archbishop's jurisdiction, and also as being within the royal palace and residence of *Westminster*.

Sir *Henry James*, A.G., and *A. L. Smith*, for Lord *Penzance*.

Jeune, and *Blakesley*, for the promoter.

The further facts and the arguments appear sufficiently from the judgment.

The following authorities were cited or referred to: *Enraght* v. *Lord Penzance* (1); *Mackonochie* v. *Lord Penzance* (2); *Attorney-General* v. *Dakin* (3); *Campbell* v. *Reg.* (4); *In re Pollard* (5); *O'Connell* v. *Reg.* (6); *In re Dean of York* (7); *Gosling* v. *Veley* (8); *Earl of Strathmore* v. *Laing* (9); *Winter* v. *Miles* (10); *Sparks* v. *Spink* (11); *Martin* v. *Mackonochie* (12); *Serjeant* v. *Dale* (13); *Moore* v. *Smith* (14); *Mayor of London* v. *Cox* (15); *Ex parte Cowan* (16); *Marsden* v. *Wardle* (17); *Rex*

(1) 7 App. Cas. 240.
(2) 6 Ibid. 424.
(3) Law Rep. 4 H. L. 338.
(4) 11 Q. B. 799.
(5) Law Rep. 2 P. C. 106.
(6) 11 Cl. & F. 155.
(7) 2 Q. B. 1.
(8) 4 H. L. C. 679.
(9) 2 Wils. & Sh. 1.
(10) 1 Camp. 475, n.
(11) 7 Taunt. 311.
(12) 4 Q. B. D. 697.
(13) 2 Q. B. D. 558.
(14) 32 L. T. (O.S.) 314.
(15) Law Rep. 2 H. L. 239.
(16) 3 B. & A. 123.
(17) 3 E. & B. 695.

v. *Stobbs* (1); *Holinshed's* Chronicles (2); *Valor Ecclesiasticus* (3); *Ayliffe's* Parergon (4); *Gibson's Codex Juris Ecclesiastici* (5); *Whitmore's* History of *Westminster Abbey* (6); *Dugdale's Monasticon* (7); *Prynne's* Ecclesiastical Jurisdiction of the Kings of *England* (8); *Brayley* and *Britton's* Houses of Parliament (9); *Barton* v. *Wells* (10); *Smith* v. *Smith* (11); *Reg.* v. *Castro* (12); *Coote's* Ecclesiastical Practice (13); *Knowles* v. *Holden* (14); *Case of the Admiralty* (15); *Nyerford's Case* (16); *Bogo de Clare's Case* (17); *Phillimore's* Ecclesiastical Law (18); *Ex parte Green* (19); *Hudson* v. *Tooth* (20).

The following Acts of Parliament were also referred to: 53 Geo 3, c. 127, s. 2; 13 & 14 Vict. c. 76, ss. 5, 6; 30 & 31 Vict. c. 40; 28 Hen. 8, c. 12.

July 13, 1882. CHITTY, J.:—

This case was elaborately argued before me some time since. The argument displayed not less than the usual amount of ingenuity, learning, and research for which cases of this class are remarkable. Considerable intervals elapsed between the various stages of the argument, the interruption being chiefly occasioned by my being called away on circuit. At its termination I found it necessary to postpone delivering judgment that I might have an opportunity of consulting the numerous authorities which had been cited, some of which are not readily accessible.

On the argument before me to make absolute the order for prohibition Mr. *De la Bere's* counsel insisted on only two grounds of objection to Lord *Penzance's* jurisdiction to pronounce the sentence of deprivation of the 8th of January, 1881.

The first objection is founded on the supposed effect of an order

(1) 3 T. R. 735.
(2) Vol. iii. p. 928.
(3) Vol. i. p. 460.
(4) Page 492.
(5) Pages 210, 978.
(6) Page 103.
(7) Vol. vi. p. 1348.
(8) Vol. ii. pp. 358, 727.
(9) Page 407.
(10) 1 Hagg. Cons. 21.
(11) 3 Hagg. Eccl. 757.
(12) Law Rep. 9 Q. B. 350.
(13) Pages 243, 244.
(14) 24 L. J. (Ex.) 223.
(15) 12 Rep. p. 302.
(16) Co. 3rd Inst. p. 141; Prynne's Parliamentary Writs, p. 1189.
(17) Co. 4th Inst. p. 24; Prynne's Parliamentary Writs, p. 819.
(18) Page 1260.
(19) 7 Q. B. D. 273.
(20) 3 Q. B. D. 46.

C. A. 1882 COMBE v. DE LA BERE. Chitty, J.

of the 9th of March, 1878. The second relates to the place where Lord *Penzance* sat.

A third objection raised on the motion before the Master of the Rolls for the order *nisi* and founded on the decree of the 17th of July, 1877, and of a similar nature to the first objection, was abandoned before me.

As to the first ground. The order of the 9th of March, 1878, was made in the first suit instituted in 1874 against Mr. *De la Bere* in the Arches Court in pursuance of letters of request from the Bishop of *Gloucester* under the *Church Discipline Act* of 3 & 4 Vict. c. 86. It is admitted on the part of the applicant that this suit proceeded regularly down to the order of the 9th of March, 1878, and no objection is raised as to the validity of that order itself; but it is said that so soon as that order was pronounced, the Court, acting under the statutory authority by virtue of the letters of request, became *functus officio* and had no jurisdiction to make any further order in that suit. The Court however did, in fact, proceed to pronounce the further order of the 23rd of March, 1878, directing a suspension *ab officio et beneficio* for six months. And accordingly a suspension was issued on the 29th of the same month. A monition was also issued on the same date.

The sentence of deprivation against which the prohibition is sought was pronounced in the second suit instituted against Mr. *De la Bere* in March, 1880, under fresh letters of request from the Bishop of *Gloucester* under the *Church Discipline Act*. This suit was proceeded with regularly down to and including the sentence itself.

Mr. *De la Bere* defended the first suit down to the 23rd of March, 1878, on which day he revoked his proxy and declined further to appear. The order of the 23rd of March, 1878, was made and the subsequent proceedings were taken in his absence, although he was duly served. He was duly cited in the second suit, but he declined to appear.

The objection to the sentence of deprivation is that it proceeds on the order of the 23rd of March, 1878, and the suspension and monition of the 29th of March, 1878, in the first suit, and it is argued that inasmuch as, according to the applicant's contention,

that order and the suspension and monition which followed it were all invalid, the sentence of deprivation was bad, being pronounced without jurisdiction. To make this objection intelligible it is necessary to refer shortly to some of the proceedings in the first suit. By the decree of the 17th of July, 1877 (now admitted to be merely an interlocutory decree), the Judge declared that certain articles setting forth various unlawful practices of a ritualistic character had been sufficiently proved, and directed Mr. *De la Bere* to file a declaration that he would abstain from such practices in future. This decree was followed by the order of the 9th of March, 1878. It states that the Judge "by his interlocutory decree having the force and effect of a definitive sentence in writing" decreed and declared that Mr. *De la Bere* had failed to file the declaration required, and it then proceeds to declare that Mr. *De la Bere* ought to be suspended for the space of six months, and directs a suspension to issue accordingly, upon an affidavit being filed to the effect that he had not abstained from the above-mentioned practices, suspending him for the space of six months from the time of publishing the suspension for that purpose in the parish church of *Prestbury*, and directs the said suspension "if issued" to be published in the parish on the Sunday next following the day on which the suspension issues. The Judge then proceeds further to admonish Mr. *De la Bere* to abstain for the future from the practices proved, and directs that a copy of the decree be transmitted to the Consistorial Court at *Gloucester* in order that such sequestration or sequestrations may then be issued or such other steps be taken as the nature of the case may appear to require.

The affidavit required by this decree was duly filed on the 15th of March, and on the 23rd of March, 1878, the Judge pronounced the decree of that date. It recites the filing of the affidavit and then proceeds to decree suspension for six months unconditionally, and contains directions similar to those contained in the order of the 9th of March, except that whereas the order of the 9th of March was conditional on the filing of the affidavit the order of the 23rd March is absolute, the affidavit having been filed.

The sentence of deprivation recites the substance of the proceedings in the first suit, setting forth the articles in that suit,

C. A. 1882 COMBE v. DE LA BERE. Chitty, J.

the decree of the 17th of July, 1877, the decree of the 23rd of March, 1878, and the suspension and monition of the 29th of March, 1878; but it omits all mention of the order of the 9th of March, 1878, treating it obviously as an interlocutory order which had been superseded in effect by the decree of the 23rd of the same month. It states additional articles setting forth ecclesiastical offences of the same nature as those declared to be proved in the first suit but committed on the 31st of March, 1878, and numerous subsequent occasions, which are specified. It declared that the promoter had "sufficiently proved the articles" in the second suit, and then pronounces, decrees and declares that Mr. *De la Bere* "by reason of the premises and for and on account of his said several offences ought to be deprived of his benefice" and then deprives him of it accordingly.

In these circumstances it is said that the sentence of deprivation was passed in respect of all the offences recited therein, including disobedience to the decree of the 23rd of March, 1878, and to the suspension and monition of the 29th of March, 1878; that this decree and the suspension and monition are void, and that the sentence, being one and indivisible in respect of all the offences charged, is void on the doctrine of *O'Connell* v. *Reg.* (1). There are at least four fatal objections to this argument.

First. The House of Lords since the conclusion of the argument before me, decided in *Enraght* v. *Lord Penzance* (2) that the principle of *O'Connell's Case* does not apply to an ecclesiastical sentence, so as to afford ground for prohibition. *O'Connell's Case* was decided by a Court of Error where there was no jurisdiction to alter the sentence.

I am asked to infer that Lord *Penzance* would not have pronounced a sentence of deprivation in respect of the offences proved other than of disobedience to the decree of the 23rd of March, 1878, and the suspension and monition. I decline to draw any such inference. It was established before the Ecclesiastical Judge that at least eight distinct offences mentioned in the articles in the first suit had been committed, and that these offences had been wilfully repeated as stated in the articles in the second suit; and it is admitted that it was within his jurisdic-

(1) 11 Cl. & F. 155.

(2) 7 App. Cas. 240.

tion to decree a sentence of deprivation in respect of these offences. The severity of the sentence, if it were severe (which I do not mean to suggest it was), may be a ground for appeal, but it is no ground for prohibition.

Secondly. The order of the 23rd of March, 1878, is valid. The objection to it is founded upon the statement in the introductory part of the order of the 9th of March, 1878, describing it as "an interlocutory decree, having the force and effect of a definitive sentence in writing." And it is urged that in the face of this statement it cannot be alleged that the order of the 9th of March was not final.

In support of this contention the proviso at the end of the 13th section of the *Church Discipline Act* (3 & 4 Vict. c. 86), is referred to, which precludes appeals from interlocutory decrees. But the language of the proviso is that there shall be no appeal from any interlocutory decree or order not having the force and effect of a definitive sentence, and thereby ending the suit. These latter words seem to be not merely descriptive, but to import that there may be an interlocutory decree or order of the nature described which does not, in fact, end the suit. But, however this may be, when the order of the 9th of March, 1878, is read through, it appears on the face of it to be of a premonitory character, intimating what will be done upon the filing of an affidavit proving disobedience to the decree of the 17th of July, 1877, and it is clear that the order taken as a whole is conditional. The introductory words, which appear to have crept in *per incuriam*, are not sufficient to control the force and effect of the order itself, and make that absolute and final which is in substance merely conditional.

The orders of the Arches Court are taken down in a narrative form by the Registrar, who is a notary public. The order of the 9th of March does state historically what the Judge did on that day. Indeed, it appears to me that there would be a substantial objection to the order being treated as a final order, inasmuch as it would then have proceeded without proof of the relevant facts to decree a final sentence of suspension. It would be a strange thing if the Court of Arches had not jurisdiction to pronounce a further order in an absolute form upon the required proof being supplied.

C. A. 1882 COMBE v. DE LA BERE. Chitty, J.

Thirdly. The question as to the validity of the order of the 23rd of March, 1878, is eminently one of the proper course, practice, and procedure of the Ecclesiastical Court. If there is any ground for impeaching the order the question should be raised by way of appeal, and does not constitute a ground for prohibition. I refer to the passage in Lord *Selborne's* judgment in *Mackonochie* v. *Lord Penzance* (1), in which he states that if the sentence against which the prohibition was sought in that suit was not contrary to the statutes of the realm, "the question resolves itself, simply and entirely, into one of the proper course, practice, and procedure of an Ecclesiastical Court in a cause of which that Court had proper cognizance against a person and in a matter properly subject to its jurisdiction. Such a question ought, in my opinion, to be determined in the ecclesiastical, and not (by prohibition or otherwise) in any temporal *forum*, notwithstanding the fact, that by a sentence of suspension *à beneficio* (which the Ecclesiastical Courts, and those Courts only, have power to pronounce) temporal rights held by an ecclesiastical tenure in consideration and upon the condition of the performance of ecclesiastical duties are necessarily affected. Supposing no statute to intervene, the Ecclesiastical Courts must have jurisdiction to determine questions of this nature; and, if they have jurisdiction, prohibition does not lie to them from the temporal Courts. The remedy, if there be any error in judgment, is by appeal."

There are passages in the judgment of Lord Justice *Thesiger* in the same case in the Court of Appeal (2), which it is needless to cite. Lord *Cairns* in the House of Lords adopted the judgment of the Lord Justice *Thesiger*, and the terms in which it is expressed.

Fourthly. The alleged invalidity of the order of the 23rd of March, depending as it does on the order of the 9th of March, does not appear on the face of the record in the second suit; and in the circumstances it is too late to move for a prohibition after sentence.

The proposition stated in the judgment of the Court of King's Bench in *Ex parte Cowan* (3), that "it is a settled rule that you

(1) 6 App. Cas. 431. (2) 4 Q. B. D. 710–734.
(3) 3 B. & A. 129.

cannot apply for a prohibition after a judgment unless there be an original want of jurisdiction apparent upon the face of the proceedings" is no doubt too broadly stated.

There are some exceptions to this rule which are mentioned in Mr. Justice *Willes*' judgment in *Mayor of London* v. *Cox* (1). He says, "Where, however, the defect is not apparent" (on the face of the proceedings), "and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Crown is not taken away, for mere acquiescence does not give jurisdiction: *Knowles* v. *Holden* (2), yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant: see *Case of the Admiralty* (3)." Mr. *De la Bere* does not come within the principle of the exceptions so defined. He has not an irresistible case, or any excuse for the delay. He was duly cited in the second suit, and can gain no advantage by his wilful refusal to appear. It was competent for him in that suit to have pleaded such objections as he now puts forward to the order of the 23rd of March. He was aware of the existence of the order of the 9th of March, which was pronounced before he ceased to appear in the first suit. And all the subsequent proceedings in that suit were duly served on him. This case, therefore, does not fall within the exception which was allowed in *Serjeant* v. *Dale* (4), where it was held that Mr. *Dale* was excused from the delay in asking for the writ on the ground of his ignorance of an objection which did not appear on the face of the proceeding. Nor does it fall within the exception mentioned in the *Case of the Admiralty*, the principle of which is that the prohibiting Court will grant the writ where "it appears

(1) Law Rep. 2 H. L. 283.
(2) 24 L. J. (Ex.) 223.
(3) 12 Rep. p. 302.
(4) 2 Q. B. D. 558.

C. A. 1882 COMBE v. DE LA BERE. Chitty, J.

by any matter in writing or other good matter," that the Court sought to be prohibited never had any jurisdiction whatever, as for instance where the old Court of Admiralty tried an offence shewn to be committed upon the land *infra corpus comitatus*.

For the above reasons I have come to the conclusion that the first ground of objection wholly fails.

I now proceed to consider the second objection to the sentence of deprivation, namely, that which depends on the place where Lord *Penzance* sat. It appears from the sentence itself that it was signed and promulgated by Lord *Penzance* as Official Principal of the Arches Court of *Canterbury* in Committee Room E of the House of Lords at *Westminster*.

It is a principle of law that a Judge who has only a local jurisdiction, must exercise his jurisdiction within the locality over which it extends. If Committee Room E of the House of Lords is not within the province of *Canterbury* a prohibition ought to go against further proceedings under the sentence.

It is remarkable that Lord *Penzance* sitting in Committee Room E on the hearing of an application in the course of the proceedings in the first suit on the 10th of January, 1878, himself raised the question whether he could lawfully exercise his jurisdiction as Dean of the Arches in that place. After some slight discussion he stated (according to the shorthand notes read to me) that he would consider the matter, and that if necessary the case should be brought on before him in some other place. So far as appears from the papers before me the subject then dropped, and was not subsequently called to his attention, and I have not the advantage of any expression of opinion on the part of that learned Judge on this point, except that he did, when pronouncing the sentence now in question, actually sit in the same committee room.

It is argued that this committee-room is a place exempt from the jurisdiction of the Arches Court on two grounds.

First, because it is not within the province of *Canterbury*, being within a royal peculiar, and therefore exempt from the archbishop's jurisdiction.

Secondly, because it is within the Royal Palace of *Westminster*.

The gist of the argument is taken from the resolution in *Nyerford's Case* (1), to the effect that the King's Palace at *Westminster* is a place exempt from all jurisdiction of the ordinary, as well by reason of the royal dignity and Crown as of the liberty of the church of *Westminster*, and particularly in the presence of the King during the holding of Parliament there, so that no citation or summons can be lawfully served there. This conclusion was come to in a suit in which the King and the Abbot of *Westminster* and certain officers of the King were prosecutors. The case is more fully stated in *Prynne's* Parliamentary Writs (2). The case of *Bogo de Clare* (3), decided in the eighteenth year of the reign of *Edward* I., and also more fully stated in *Prynne* (4), is to the like effect.

I will deal with these points separately.

First, as to the ecclesiastical jurisdiction. It is proved by evidence put in on the part of Mr. *De la Bere* that the whole of the Palace of *Westminster* is locally situate within one or other of the two parishes of *St. Margaret* and *St. John, Westminster*. In the appendix to the *Valor Ecclesiasticus*, as printed by royal command in 1810, there appears a certificate under the hand of the Bishop of *London*, which is admitted to be correct, that the rectory of *St. John the Evangelist, Westminster*, and the curacy of *St. Margaret, Westminster*, were peculiars subject to the jurisdiction of the Dean and Chapter of *Westminster*. This jurisdiction had apparently belonged in former times to the Abbot of *Westminster*, and had passed to the Dean and Chapter at the Reformation. The monastery being a royal foundation was apparently a royal peculiar, but, according to the record in *Bogo de Clare's Case*, had become subject to the jurisdiction of the Pope. Certainly the Dean and Chapter of *Westminster*, as the successors of the monastery, have since the Reformation been, and are still, a royal peculiar, and as such subject in matters ecclesiastical to the immediate jurisdiction of the Crown as head of the Church. This fact appears from the statements in page 557 of the Appendix to the Report of the Ecclesiastical Commissioners of the 15th of February, 1832. It is an important fact that the certificate of

(1) Co. 3rd Inst. p. 141.
(2) Page 1189.
(3) Co. 4th Inst. p. 24.
(4) Page 819.

C. A. 1882 COMBE v. DE LA BERE. Chitty, J.

the Bishop of *London* and the appendix to the Commissioners' report, which purport to give an exhaustive list of all peculiars within the ambit of the diocese of *London*, do not specifically mention the Palace of *Westminster*, the reason being, as I apprehend, that the palace was locally situate within one or other of the parishes of *St. Margaret* and *St. John*.

There is no ground whatever for saying that there was any ecclesiastical jurisdiction within the palace at the time of the passing of the statute 6 & 7 Wm. 4, c. 77, except such as I have already mentioned. It is true that within the old palace there formerly stood the Chapel of *St. Stephen*, reported to have been founded by King *Stephen*. The dean and canons of the chapel were incorporated and endowed by royal charter by *Edward* III., and apparently became a royal peculiar. But the corporation was dissolved at the Reformation and its property granted away to subjects, except the building of the chapel itself, which fell to the Crown, and was used from about that time by the Commons as their house until it was burnt down in 1834. All ecclesiastical jurisdiction arising in respect of *St. Stephen's* chapel ceased at the Reformation. In this state of things the statute of 6 & 7 Wm. 4, c. 77, was passed, one of the objects of which was to put an end to the confusion which had arisen in ecclesiastical matters by reason of the existence of peculiars. There were, as appears from the Report of the Ecclesiastical Commissioners of the 15th of February, 1832, p. 21, upwards of 300 of such special ecclesiastical jurisdictions in *England*, including royal peculiars, of which there were eleven. The Commissioners recommended the abolition of all peculiars. An excellent illustration of the confusion to which they gave rise, even in such matters as the granting of probates, is afforded by the case of *Smith* v. *Smith* (1). By the 10th section of the above Act the Ecclesiastical Commissioners were directed to prepare and lay before the King in Council such scheme as should appear to them to be best adapted for carrying into effect certain recommendations in their report, and in particular it is provided that "it shall be competent for them to propose in any such scheme that all parishes, churches, or chapelries which are locally situate in any diocese, but subject to any peculiar jurisdiction

(1) 3 Hagg. Eccl. 757.

other than the jurisdiction of the bishop of the diocese in which the same are locally situate, shall be only subject to the jurisdiction of the bishop of the diocese within which such parishes, churches, or chapelries, are locally situate." After providing, by sect. 12, for the approval and ratification of such schemes by Order in Council, it is enacted by the 14th section that any such Order in Council, when registered and gazetted, should in all respects, and as to all things therein contained, have the same force as if every part thereof were included in the Act itself, any law, statute, canon, letters patent, grant, usage, or custom, to the contrary notwithstanding.

In pursuance of these provisions a scheme relating to the diocese of *London* was proposed by the Commissioners and ratified by the Queen in Council on the 8th of August, 1845, and subsequently duly gazetted. This order provides that all parishes and places locally situate within the limits of the several dioceses of *Canterbury*, *London*, and certain other dioceses, and all churches and chapels, and the whole clergy and others locally situate within the limits of such parishes and places respectively, should, notwithstanding any peculiar jurisdiction or exemption from jurisdiction which any of such parishes, places, churches, chapels, or clergy, might then possess or be subject to, or claim to be possessed of or subject to, be respectively under and subject to the jurisdiction and authority of the bishops of the said several dioceses, and of the archdeacons of the several archdeaconries of such several dioceses within the limits of which several dioceses and archdeaconries they should respectively be so locally situate, and to no other ecclesiastical jurisdiction whatsoever, except the cathedral churches of and within the said several dioceses and the royal residences and the churches or chapels founded therein or annexed thereto, including the Collegiate Church of *St. Peter, Westminster*, which should respectively be subject to the jurisdiction and visitation (if any) to which they were then by law respectively subject, and to none other, and, with the like exceptions, all and each of such parishes, places, churches, and chapels, so possessing or being subject to or claiming to possess or to be subject to any such peculiar jurisdiction or exemption from jurisdiction, should severally and respectively be included in and form

C. A. 1882 COMBE v. DE LA BERE. Chitty, J.

part of the dioceses and archdeaconries respectively within the limits of which they should respectively be so locally situate.

In 1840 a statute (3 & 4 Vict. c. 113) was passed, relating among other things to the parishes of *St. Margaret* and *St. John, Westminster*. By the 29th section of that Act the rectories of these parishes were annexed to two canonries of *Westminster*, and it was provided that these parishes should become and be part of the province of *Canterbury*, of the diocese of *London*, and of the archdeaconry of *Middlesex*, and that the said parishes and the rectors and other ministers and officers thereof should in ecclesiastical matters be subject only to the jurisdiction of the Archbishop of *Canterbury*, the Bishop of *London*, and the Archdeacon of *Middlesex*, respectively, in the same manner as other parishes in the said province, diocese, and archdeaconry were respectively subject thereto, and be exempted and relieved from all other ecclesiastical jurisdiction whatsoever.

The effect of these enactments and Order in Council was to abolish the peculiar which the Dean and Chapter of *Westminster* had in the parishes of *St Margaret* and *St John*, and consequently in the Palace at *Westminster*, proved, as already mentioned, to be locally situate within one or other of them.

It was, however, contended, that the Crown not being specially named was not bound by these statutes and order; and that the peculiar ecclesiastical jurisdiction which the Crown as paramount head of the Church possessed over the palace as the peculiar of the Dean and Chapter of *Westminster* still continues. This contention cannot be maintained. The language of the statutes and the order is precise. Not only is the then existing peculiar jurisdiction taken away, but the jurisdiction of the Archbishop of *Canterbury* is established locally in the places mentioned. Beyond doubt the Crown is bound by the affirmative and negative provisions.

The very special case of the Deanery of *St. Burian*, in *Cornwall*, and the statute 13 & 14 Vict. c. 76, were referred to in order to shew that the Crown was not bound. But they cannot countervail the effect of what I have stated. That case has no bearing on any question as to the force of the statute 3 & 4 Vict. c. 113; at the utmost it can relate only to the construction and effect of

the statute 6 & 7 Will. 4, c. 77, and the Order in Council, a similar order having been made on the 11th of February, 1848, in reference to the diocese of *Exeter* before the statute 13 & 14 Vict. c. 76, was passed. The deanery was a donative of the Duke of *Cornwall* as well as a royal peculiar, and the statute 13 & 14 Vict. c. 76, not merely abolished the peculiar but the deanery itself. Possibly the Order in Council of the 11th of February, 1848, was overlooked when this statute was passed. Other royal peculiars were abolished by similar Orders in Council made in pursuance of 6 & 7 Will. 4, c. 77, and were not, as far as I am aware, dealt with by subsequent Acts of Parliament. As instances, I mention *Gillingham* and *Bridgnorth;* a further search would probably discover others.

Secondly, as to the supposed exemption by reason of the Palace at *Westminster* being a royal palace.

The distinction between a royal palace simply and a royal palace which is also a royal residence is now well settled by a series of authorities. The more recent as well as important of these are *Winter* v. *Miles* (1) (relating to *Kensington Palace*, decided in 1809), the *Earl of Strathmore* v. *Laing* (2) (relating to *Holyrood Palace*, decided in 1826), and *Attorney-General* v. *Dakin* (3) (relating to *Hampton Court Palace*, decided in 1870). The distinction is as early as the time of Lord *Coke*. In commenting on *Nyerford's Case* (4) he points out that "this royal privilege is not only appropriated to the Palace of *Westminster* but to all the king's palaces where his royal person resides, and this privilege is to be exempted from all ecclesiastical jurisdiction, *regiæ dignitatis et coronæ suæ ratione*." Lord *Ellenborough*, referring evidently to this passage, states that he had the authority of Lord *Coke* for saying that by the Common Law no process ought to be executed within any palace where the king's royal person resideth: *Winter* v. *Miles*. The distinction was obviously known to the framers of the Order in Council of the 8th of August, 1845, where the exception is not of the royal palaces but of the royal residences. The latter authorities which I have mentioned further shew that the exemp-

(1) 1 Camp. 475, n.; 10 East, 578.
(2) 2 Wils. & Sh. 1.
(3) Law Rep. 4 H. L. 338.
(4) Co. 3 Inst. p. 141.

C. A. 1882 COMBE v. DE LA BERE. Chitty, J.

tion does not belong to the place except only so far as it is connected with the person of the sovereign, and that in order to give the exemption the sovereign need not be personally residing or actually residing in the place, virtual residence is sufficient.

The authorities are guides to shew what is the proper inference to be drawn from the facts. In *Attorney-General* v. *Dakin* (1) the facts were that the chief officials and the chaplain, together with the housekeeper and the gardener, were all appointed by the Crown, and paid out of the Civil List; that a pew was always kept in the chapel ready for the royal use, that there were certain apartments, then known as state apartments, in which pictures belonging to the Crown were exhibited to the free inspection of the public; that a guard of honour was always posted there; that the inmates to whom the sovereign had granted the use of apartments there held such apartments at the pleasure of the Crown, and that the grapes grown in the vinery were kept for the service of Her Majesty's table. The Queen herself had never resided there. The circumstances were such as to give rise to a remarkable difference of opinion among the learned Judges before whom the case came, but the House of Lords decided that *Hampton Court* although a royal palace was not a royal residence. Lord *Chelmsford*, in advising the House, stated (2), that the question was, Is the palace so occupied by others as that Her Majesty could not immediately return and reside in her own person if she were pleased to do so?

Now what are the facts in relation to the existing edifice of the Palace of *Westminster*, for it is with that building alone that I am concerned.

The old palace, which had in the course of time been considerably enlarged, was, as is well known, burnt down in 1834, and the present palace was erected on a much more extended site, the extension being principally towards the south. It has been a matter of contest before me whether Committee Room E does or does not stand on part of the site of the old palace. No satisfactory proof has been adduced on either side. The burden of proof would rest on those who claim the exemption, but I do not think that this question of fact is material.

(1) Law Rep. 4 H. L. 338. (2) Law Rep. 4 H. L. 372.

The present palace has never in fact been used as a royal residence.

In the statute 30 & 31 Vict. c. 40, passed to enable the Commissioners of Works to acquire lands for the purposes of "The New Palace at *Westminster*," it is styled in the preamble "Her Majesty's New Palace at *Westminster*, commonly called the Houses of Parliament," and in the body of the Act is styled "The New Palace at *Westminster*." The short title of the Act is "*The Houses of Parliament Act*, 1867."

The palace has not been constructed nor fitted up for the residence of the sovereign. It is under the control not of the Lord Chamberlain of the Household, but of the hereditary officer known as the Lord Great Chamberlain. He has (as appears by the certificate or letter of the Deputy Lord Great Chamberlain put in evidence on the part of Mr. *De la Bere*) the general control and keeping in order of the House of Lords and its committee rooms, except during the session of Parliament, during which the key of the House of Lords is entrusted by the Lord Great Chamberlain to Black Rod. This certificate also states as follows: "What apartments shall be kept for Her Majesty's use on the occasion of her coming to Parliament is a matter as to which Her Majesty's personal wishes would be ascertained whenever the occasion might arise, and would be instantly obeyed without any question of right or authority in the matter; so that nothing that might be done in reference to this could affect any question of legal rights." It also states that there are no records of Her Majesty's having assigned portions of the palace when the new palace was built to the House of Lords and the House of Commons respectively, but that possession of the different parts of the new Houses was given as they were ready and complete for occupation under the authority of the then Lord Great Chamberlain.

In fact the two distinct parts known as the House of Lords and the House of Commons, with their respective libraries, committee rooms, and other conveniences, have ever since the completion of the edifice been devoted solely to the use of the Lords and Commons respectively.

It is true that Her Majesty's throne is in the House of Lords, and that the Queen summons her Parliament to meet her at

C. A. 1882 COMBE v. DE LA BERE. Chitty, J.

Westminster and attends there in the House of Lords whenever it pleases her so to do for the purpose of opening or proroguing Parliament. But in my opinion the existence there of the throne and the circumstance of Her Majesty's attending the House of Lords occasionally on great occasions of state are not sufficient when taken in connection with the fact of the actual occupation of the building by the Lords and Commons to make the palace at *Westminster* a royal residence.

I must not wholly pass by an argument which was addressed to me on behalf of Mr. *De la Bere*, on this part of the case, founded on the statute 28 Hen. 8, c. 12, for declaring the limits of the King's Palace of *Westminster*. The ancient palace, which was built or enlarged by *Edward the Confessor*, and had been used as a royal residence by many sovereigns after the Conquest, had in *Henry* VIII.'s time fallen into ruin, and that monarch after his acquisition of *Cardinal Wolsey's* house at *Westminster*, called *York Place*, and now represented by *Whitehall*, purchased (to use the language of *Holinshed* (1)), "All the meadows about *St. James*' and there made a fair mansion and a park for his greater commodity and pleasure, and because he had a great affection to the said house at *Westminster* he bestowed great cost in going forward with the building thereof, and changed the name, so that it was after called the King's Palace of *Westminster*."

The statute of 28 Hen. 8, c. 12, passed a few years afterwards, enacted that all this additional property and also the soil of the ancient palace should be thenceforth the King's whole Palace at *Westminster*, and should be taken and called "the King's Palace at *Westminster* for ever." The statute extended the limits of this palace up to *Charing Cross*, and annexed to the palace within these extended limits all the privileges of the ancient palace, which was thenceforth to be deemed only as a member of the new palace.

Upon this statute it was argued that the privileges of a royal palace were affixed to *Westminster Palace* in perpetuity; but besides proving too much (for counsel for Mr. *De la Bere*, who certainly were not deficient in boldness, declined to assert that the privileges now extend to the entire district up to *Charing*

(1) Holinshed's Chr. vol. iii. p. 928.

Cross) this argument merely brings me back to the question what are the privileges of a royal residence? a question I have already disposed of.

The same observation applies to the argument founded on the jurisdiction of the Queen's Coroner, which exists or is claimed to exist in all the royal palaces without distinction.

There is another equally fatal objection to the argument of Mr. *De la Bere* in regard to the palace. The privilege of exemption not being appropriated to the locality itself, but being a personal privilege of the sovereign communicated to the place only during the actual or virtual residence of the sovereign there, can plainly be waived or dispensed with. In *Nyerford's Case* (1) and *Bogo de Clare's Case* (2) the proceedings were at the suit of the Crown, and the officers of the Crown whose offices were disturbed as well as of other parties aggrieved.

In *Sparks* v. *Spink* (3) it was held that an arrest within the verge of the palace was no ground for discharging the defendant out of custody, *Park*, J., saying that if those who had jurisdiction were injured it was for them to complain, and *Burrough*, J., stating that the point had been decided twenty years ago upon solemn argument.

In *Rex* v. *Stobbs* (4) the defendant was indicted for assaulting and imprisoning an officer of the Palace Court within the King's Palace at *Westminster*, his majesty being actually resident and abiding in his royal person in the palace. A special verdict sets forth the statute 28 Hen. 8, c. 12 (already referred to) and letters patent of *Charles* II. constituting the Palace Court (which has since been abolished by statute). Lord *Kenyon* in giving judgment stated that "supposing there were certain privileges annexed by the Common Law to the king's palaces prior to the reign of *Charles* II., yet undoubtedly the king had a right to dispense with any of those privileges," and he held that the king had by the charter of *Charles* II. dispensed with some of them as respects the Palace of *Westminster*. So in the judgments of *Willes*, *Keating*, and *Montague Smith*, JJ., in the *Attorney-General* v. *Dakin* (5) those learned Judges stated that it was not likely

(1) Co. 3rd Inst. p. 141.
(2) Co. 4th Inst. p. 24.
(3) 7 Taunt. 311.
(4) 3 T. R. 735, 744.
(5) Law Rep. 3 Ex. 288.

C. A. 1882 COMBE v. DE LA BERE. Chitty, J.

that the existence of the privilege claimed would ever lead to injustice or inconvenience, as an application to the Lord Steward or other proper officer of Her Majesty's household, would always obtain a remedy for the creditor, either by permission to execute process within the palace, or by his insisting upon the prompt discharge of the debt as a condition of the enjoyment of Her Majesty's bounty. Lord *Hatherley* in his speech advising the House of Lords in the same case adopts this passage (1).

Now it is admitted before me that Lord *Penzance* sat in Committee Room E with the permission of the Lord Great Chamberlain, the proper officer of the Crown to grant such permission, indeed, the Court of Appeal when it sits in the same committee room sits by virtue of the like permission.

For these reasons I hold that the second ground of objection also fails.

The result is that the order *nisi* is discharged and with costs.

G. M.

C. A. From this judgment Mr. *De la Bere* appealed.

The appeal was heard on the 1st of December, 1882.

Davey, Q.C., and *W. G. F. Phillimore* (*Hornell* with them), for the Appellant:—

We are content to rest our appeal on the second ground taken in the Court below, namely, that Committee Room *E*, in which Lord *Penzance* delivered the sentence of deprivation, was beyond the jurisdiction of the Court of Arches. The committee room forms part of the Palace of *Westminster* and is exempt from the jurisdiction of the Court of Arches on two grounds; first as being within a royal peculiar, and not within the province of *Canterbury*, and, secondly, as being part of the Royal Palace of *Westminster*.

With respect to the first ground, the committee room is locally situate either in the parish of *St. John* or in the parish of *St. Margaret*, *Westminster*, and the whole of those parishes were formerly a peculiar of the Abbot of *Westminster*, subject only to the jurisdiction of the Pope; and on the dissolution of the monasteries they became a peculiar of the Dean and Chapter of

(1) Law Rep. 4 H. L. 369.

Westminster subject only to the jurisdiction of the Crown: *Prynne's* Ecclesiastical Jurisdiction of the Kings of *England* (1); *Gibson's Codex Juris Ecclesiastici* (2); *Attorney-General* v. *Bishop of Manchester* (3). It is true that by an Order in Council made under the authority of the 6 & 7 Will. 4, c. 77, all peculiars are made subject to the jurisdiction of the bishop in whose diocese they are locally situate; but that statute does not specially mention the Crown, and we submit that the royal peculiars were not affected by it: *Ex parte Postmaster-General* (4). The same observation applies to the subsequent statute of the 3 & 4 Vict. c. 113, by which these two parishes were made part of the diocese of *London* and province of *Canterbury*.

With respect to the second ground, the buildings of which the committee room forms part are still part of the Royal Palace of *Westminster*. They are called in the 30 & 31 Vict. c. 40, "Her Majesty's New Palace at *Westminster*," and they still retain the privileges which were originally enjoyed by the Palace at *Westminster*. One of these privileges is that it is exempt from the jurisdiction of any of the Civil or Ecclesiastical Courts, and is only subject to the jurisdiction of officers specially appointed by the Crown. The grounds on which this exemption is based, according to the old cases, are two, first, that all places of residence of the king are exempt by reason of his crown and dignity; and secondly, that the Palace of *Westminster* is in itself a privileged place: *Bogo de Clare's Case* (5); *Nyerford's Case* (6); *Rex* v. *Stobbs* (7).

The actual personal residence of the king at the time when the privilege is claimed is not necessary. In the statute of 28 Hen. 8, c. 12, which was passed when the King intended to build a new palace at *Whitehall*, the old palace is still called the King's Palace, although it is recited to be "in ruin and decay," and it still remained subject to the jurisdiction of the Palace Court. The palace is still a royal residence, the Queen

(1) Vol. ii. p. 727.
(2) Page 210.
(3) Law Rep. 3 Eq. 436.
(4) 10 Ch. D. 595.
(5) Co. 4th Inst. p. 24; Prynne's Parliamentary Writs, p. 819.
(6) Co. 3rd Inst. p. 141; Prynne's Parliamentary Writs, p. 1189.
(7) 3 T. R. 735.

C. A. 1882 COMBE v. DE LA BERE.

uses it for state purposes when she opens Parliament and on other occasions. *Westminster* is still considered the official residence of the kings of *England*. Writs are dated from it: and part of the ceremony of the coronation has always taken place in *Westminster Hall*, unless the king has specially dispensed with it: *Elderton's Case* (1); *Attorney-General* v. *Dakin* (2); *Winter* v. *Miles* (3); *Earl of Strathmore* v. *Laing* (4).

Sir *H. James*, A.G., Sir *F. Herschell*, S.G., and *A. L. Smith*, for Lord *Penzance*, and

Jeune, and *Blakesley*, for the promoter, were not called on.

JESSEL, M.R.:—

This is an appeal from a decision of Mr. Justice *Chitty* on a simple point. As far as I am concerned, I do not find fault with the Appellant for taking such a point; for a clergyman who has been deprived of his living is entitled to take any technical point that by any possibility will avail him. I am sorry to say the time of the Court has been consumed for a whole day, by what I will admit to be a very interesting argument on the part of Mr. *Phillimore*, shewing great antiquarian and legal research, on the question as to whether a Judge who pronounced a sentence which is not otherwise found fault with was sitting in the right room.

That is the whole point. I suppose if he had walked into the street outside, and delivered his sentence, no possibility of objection could have arisen. But it is said that because he sat in Committee Room E, in the House of Lords, he was sitting in a royal palace which was a place exempt from the ecclesiastical jurisdiction which he exercised as Dean of Arches, and therefore that his sentence is a nullity. I say I regret to have to decide such a point as that, but of course, it having been raised, and having been raised on the part of a man who, as I said before, has been deprived of his living by this sentence, it must be treated seriously, and it must be considered whether it has any legal foundation.

Now, it is put in this way. It is said, first of all, that this room

(1) 2 Ld Raym. 978; 3 Salk. 91, 284.
(2) Law Rep. 4 H. L. 338.
(3) 10 East, 578.
(4) 2 Wils. & Sh. 1.

is a part of the ancient Palace of *Westminster*; secondly, that though that palace of *Westminster* is now used for the purposes of the two Houses of Parliament, it retains all the privileges and exemptions which are attached to it as a palace; thirdly, it is said that there were privileges and exemptions attached to it, locally attached to the building, if I may use the expression, which exempted it, for whatever purposes it was afterwards used; and, lastly, it was said that divers modern Acts of Parliament which affect to deal with this place had no application, because, though the words might be large enough, the Acts of Parliament could not be construed so as to affect the rights of the Crown unless they were specially named, or so referred to as to lead by necessary inference to the conclusion that the rights of the Crown were intended to be bound.

The first point really to be considered is this. It is a point as to which the Judge below gave an opinion, and which I ought not to pass over, namely, that there is not only no evidence before us to shew that this room ever was part of the ancient palace of *Westminster*, but there is very strong reason to doubt it. It is plain from the Acts of Parliament which have been referred to that since the erection of the present Houses of Parliament was begun as well as before, very large quantities of land were purchased in the neighbourhood of the old palace with a view of putting the new Houses of Parliament, otherwise called the New Palace of *Westminster*, on a much larger site, and, for reasons which it is not necessary to go into, the probability is, looking at the locality in which this room is situate, that this room is after all erected on a portion of the site so acquired. But as Mr. Justice *Chitty* said on that point, the obligation of proof is on the Appellant, and he had not satisfied him. What the result of further inquiry might be I cannot say, but I am by no means satisfied that this room, or the ground on which it stands, ever did form a part of the old Palace at *Westminster*.

Passing from that we come to what is a far more important point—the nature of the privilege. Now, it is a very curious thing that this should depend on a number of cases and comments, all of which have been very well characterised by the learned counsel who argued the case with such ability, as hazy. That is

C. A. 1882 COMBE v. DE LA BERE. Jessel, M.R.

the only adjective which I think could be properly employed with reference to the old cases. Mr. *Phillimore* said, applying that term to them, that with ecclesiastical cases that was ordinarily the case, and he has such experience in these matters that I am willing to take that statement from him.

That being the position of the authorities, what do they amount to? It seems that the ancient Palace of *Westminster*, which was undoubtedly once a king's palace, and inhabited by the king, was within a peculiar, or within two peculiars—I will take it as one for the present purpose—the peculiar of the Dean and Chapter of *Westminster*. It was therefore exempt from the jurisdiction of the ordinary. So far it is clear enough. But then it is said to be exempt also as a palace from all ecclesiastical jurisdiction. When we look to the first case cited, *Bogo de Clare's Case* (1), we can hardly say so. It is a most singular case. It is a complaint made on the part of the Crown's officers, on the part of an earl, and on the part of the dean and chapter, because the earl was arrested going up *Westminster Hall* wishing to attend, or intending to attend, to his duties in Parliament. The singularity of the case is this, that there is a claim for damages by the dean and chapter joined with the claim of the officers of the Crown, shewing that the Crown recognised the claim, which is wholly inconsistent with the notion that the Crown at that time claimed to be exempt from the jurisdiction of the peculiar, and therefore it appears to me that so far as that case—which I do not pretend to say is clear—has any bearing on the subject, it is rather in favour of the contention that the dean and chapter had jurisdiction over the *locus in quo*.

Well, then, there is a subsequent case where the same point occurred, *Nyerford's Case* (2), and there is a little difference. In the first case the grounds of exemption in favour of the palace are put no doubt on this, that as a palace, that is, as a royal residence, they ought not to have jurisdiction to interfere with the king's comfort and dignity. In the second case it is put rather stronger; it is put that the place is exempt from all jurisdiction. But I am not sure when you compare the two

(1) Co. 4 Inst. p. 24; Prynne's Parliamentary Writs, p. 819.

(2) Co. 3 Inst. p. 141; Prynne's Parliamentary Writs, p. 1189.

cases—and here again I admit it is not clear—that Mr. *Phillimore* was right in saying that the additional reason, as he called it, given in the second case is really an additional reason, and that it is not rather an expansion of the reasons given in the first case. As I said before, it is for those who allege that there is no jurisdiction to shew it, and not for us necessarily to say what all these old cases mean.

Then reference was made to a comment of Lord *Coke's* on the second case. I do not understand that comment of Lord *Coke's* to mean either that the king then resided at *Westminster*, or that the exemption applied to the palace at *Westminster*, whether the king resided there or not. I think he is speaking—and here again I do not mean to say it is clear—of the case as it was when that case occurred, and that what he means to say is this: "You see the Palace of *Westminster* where the king then resided was exempt, but the case is intended to decide the general proposition that all palaces where the king resides are exempt." That is how I read it. It may be a wrong reading. I cannot say. It is very difficult to know exactly what he does mean.

Well, then, we have a series of modern cases, and I must say, looking at the modern cases, I think the Judges have all taken that view. Indeed, the cases would have no meaning unless they did. In the *Kensington Palace Case, Winter* v. *Miles* (1), the Judges went most elaborately into the consideration as to whether or not the palace was properly described as the king's residence, and there they pointed out that it might be a king's residence although he did not actually live there at the moment. They considered the nature of the king's property in it, the number of people he kept there, his servants, and the mode in which his apartments were kept. The whole case, therefore, depended on their view of the law that residence was necessary, and the same is practically the older case at *Westminster*, because there also it was considered that residence was necessary. When we come to the *Holyrood Case, Earl of Strathmore* v. *Laing* (2), the same consideration applies exactly, and the same as to the *Hampton Court Case, Attorney-General* v. *Dakin* (3), though there was a great differ-

(1) 10 East, 578. (2) 2 Wils. & Sh. 1.
(3) Law Rep. 4 H. L. 338.

C. A. 1882 COMBE v. DE LA BERE. Jessel, M.R.

ence of opinion between the Judges and between the Peers who decided that case as to whether or not *Hampton Court Palace* was really a residence of the sovereign. The whole case depended from beginning to end on the question as to the privilege being limited, if I may say so, to a residential privilege, that is, a privilege not absolutely dependent on the locality, but only a privilege of a palace, or attached to a palace, when the king was living in it, that is, when it was really the residence of a sovereign.

That being the position of matters, it appears to me that we ought not now to say for the first time that there is such a privilege attached to the locality *per se*, and still less when we see that it is a locality which is devoted to quite a different purpose from that of the residence of the sovereign. It appears to me, therefore, that the proposition on the part of the Appellant that this is a privilege attached to the place, and which remains attached to the place for whatever purpose that place is used, cannot be maintained.

I now come to the second proposition. They say, assuming it is not attached to the place, it is at the present moment the residence of the Queen. Well, I must say if this were not an ecclesiastical case, I do not think anybody would attempt so to construe ordinary language. Is there anybody, either in this Court or out of it, who ever called the Houses of Parliament the residence of the Queen, or who before this argument said, or could have been supposed to say, that the Queen resided either in the House of Lords or in the House of Commons? The very terms are utterly inconsistent with the notion of residence. It is not necessary to define residence; it has been commented on in very many cases, but it is something of a totally different character. It is quite true there may be cases of residence, although the person has never slept there; you may have a residence to which you go occasionally without ever sleeping there, and it may be that there are cases in which sovereigns may properly be said to be resident in a palace though they do not sleep there, and though they only go there occasionally and for a special purpose. But we must consider the position of Her Majesty with regard to the Houses of Parliament. She goes there to open Parliament, and sometimes they are called her Houses of Parliament, and she invites the members of both

Houses to meet her there, and she has her throne there; and when she does go there she goes in state, and goes through certain formalities. But that does not make it her residence. Everybody is familiar with the distinction between a man's residence and his office. He may have an official residence, but the distinction is one that is obvious. Indeed there are cases, as in the case before me, in which the difficulty is to bring one's mind to consider the proposition at all. It seems so plain that it is not her residence.

That being so, it seems to me plain that this property, though there was once a palace there—which I assume for the present purpose included this room—a sovereign's palace—it has now been devoted to totally different purposes, to the purpose of being a place for the meeting of the two Houses of the Legislature, and that it is no longer the Queen's residence, and therefore it is not entitled to the exemption claimed.

For these reasons it appears to me that the decision of the learned Judge of the Court below was correct and ought to be affirmed.

COTTON, L.J.:—

I am of the same opinion. Although the point may be put as a narrow one, whether the judgment which would have been good if the Judge had moved a little way, was bad if he stayed where he did, yet the real question is, and we must consider it as such, whether this Judge of limited jurisdiction has or has not exceeded his powers by sitting in a place beyond his jurisdiction. I do not at all complain of the matter being argued at the length at which it has been argued.

The way in which it is put is simply this.—That Committee Room E is part of the Palace of *Westminster*, and as such is locally exempted from the ecclesiastical jurisdiction of the Archbishop. Now I treat it for the purpose of my judgment as being part of the ancient Palace of *Westminster*. If I had to decide I should say it is part of that which is called the Palace of *Westminster*, but it is not a question whether this is part of the Palace of *Westminster*, but whether that building called the Palace of *Westminster* is exempt from ecclesiastical jurisdiction, and the question must be on what ground certain palaces have been

C. A. 1882 COMBE v. DE LA BERE. Cotton, L.J.

exempted from ecclesiastical jurisdiction. It is put by the Appellant on this ground, as I understand it, that there is a local exemption of the palaces of the sovereign from ecclesiastical jurisdiction, without any reference at all to the purposes for which they are used, and without any reference to the residence of the sovereign there, or rather to the place being one of the residences of the sovereign, that a palace has once for all a local exemption, an exemption of the place from the ecclesiastical jurisdiction of the ordinary. Is that the correct view?

The authorities which have been referred to consist of numerous authorities, but of some modern cases which I will mention first. The more modern cases are those relating to the palaces at *Hampton Court*, *Holyrood*, and *Kensington*. Now in all those cases, and even on the part of the Judges who dissented from the conclusions at which the House of Lords arrived in the *Hampton Court Palace* case, the question dealt with is this. Is this to be considered as a royal residence? And the facts in each of those cases were gone into for the purpose of considering whether it could be said that the palace in question was a royal residence, and where it was decided that it could not be so held, then the exemption, the privilege, was not maintained, but where it was held that it could be so considered, the exemption, the privilege, was maintained.

Now that entirely, in my opinion, puts aside the principle for which the Appellant has contended. Is there an exemption from ecclesiastical process different from that which there was in these cases, which was for civil process. The earliest case which has been referred to, *Nyerford's Case* (1), and the comments of Lord *Coke* upon it, are not, as I understand it, put upon any such ground. Lord *Coke* puts it not as a principle simply applying to ecclesiastical jurisdiction, but to the exemption of the palace of the sovereign from the process in other matters too. It is true he does mention the Palace of *Westminster*, without adding to it, "so long as the sovereign resides there," and he does mention it in terms, which if separated from what follows, would seem to put it on a different footing from other palaces. But if one really considers the passage taken with the context, he is commenting upon

(1) Co. 3 Inst. p. 141.

a case which took place with reference to an act done while the sovereign was actually residing in the Palace of *Westminster*, and what he adds is:—"This royal privilege is not only appropriated to the Palace of *Westminster*, but to all the king's palaces where his royal person resides," shewing, therefore, that in his opinion it was not an especial exemption of the Palace of *Westminster*, an exemption of that spot, but that in that case the exemption applied to the palace where the king was then residing, and I think the way in which he deals with that clearly shews that in his opinion the Palace of *Westminster* had no especial exemption as a *locus*, as a spot, but simply had exemption because it was then the palace where the sovereign resided, and that all other palaces were on the same footing if it could be predicated of them when the act complained of took place that they were palaces where the sovereign resided. Having regard, therefore, to what I think is the true interpretation of this passage of Lord *Coke's*, and what was dealt with by the Judges who decided or dealt with the other cases, in my opinion it is not an exemption once for all of a place, because it has been declared to be or has become a royal palace where the sovereign is resident, but that it is an exemption of a place in consequence of the personal privileges of the sovereign, those personal privileges attaching to the place so long as it can be called a royal residence, but not extending beyond that period.

What is a royal residence? It is undoubtedly the fact that it is not necessary that the sovereign should be actually there. That cannot be contended. There are numerous *dicta* and cases which shew that it is unnecessary. In my opinion this at least must be said of a royal residence, that it is a palace where the sovereign has resided, and which is not appropriated to any other purpose inconsistent with the sovereign at any time coming to it and residing there.

Many people have houses which undoubtedly one would call their residences in which they seldom reside; but they are always kept in such a state as to be capable of being used as residences, and when those places are applied for any considerable period of time to any purpose inconsistent with residence there then, in my opinion, they would cease to be called residences. So as

C. A. 1882 COMBE v. DE LA BERE. Cotton, L.J.

regards palaces; a palace may still remain a palace, but it may be so appropriated to purposes inconsistent with residence that it cannot be called a palace in the sense of a royal residence. Then one comes to this question, whether this is the case as regards what is called the Palace of *Westminster*. In my opinion it is so, for I cannot consider that the fact of the sovereign going there to open Parliament or to dissolve Parliament can be considered as an act connected with residence. It is a great act of state which she performs in her person, but the building is appropriated to the sittings of the Lords and Commons and to the acts of state which the Queen does when she goes there. It is appropriated therefore, in my opinion, to that which is inconsistent so long as it is so appropriated with its use as a royal residence. In my opinion, therefore, it cannot be said that this is a royal residence, or that the sovereign can be considered as residing there, and that the exemption is lost in consequence of that which gave the exemption to this place no longer existing or continuing.

BOWEN, L.J.:—

This is a case of very great importance to the Appellant, and possibly to those who sympathise with him. It is a case in which a Judge of strictly limited jurisdiction is by his judgment depriving of his freehold the person who complains. If a person has his freehold taken from him by a judgment it seems to me that he is morally, as well as legally, entitled to insist upon every single link in the chain which creates the jurisdiction of the Judge being completely formed. I therefore examine this case, which I propose to do in not many words, with a full sense of the importance of it to the Appellant.

The first question which underlies it all is whether this committee room is or is not part of the old Palace of *Westminster*. Upon that the materials really hardly enable one to form a judgment. The only thing that I wish to add to what has been said already is this, that considering the amount of ingenuity, research, and ability which has been brought to bear on the argument in this case, I am struck with the fact that we have not had materials brought before us by the Appellant to shew that this room was part of the old Palace of *Westminster*. It certainly

suggests a surmise that it was on ground added to the old palace. However I assume, for the purpose of my judgment, that this is part of the old Palace of *Westminster*.

Now let us consider whether there is any such privilege as the Appellant claims. The old Palace of *Westminster*, it may be said upon two grounds, stood apart and was in an exceptional position. In the first place, the king resided there; and in the second place, it was within a peculiar belonging to the Dean and Chapter of *Westminster*. Now one of those reasons—the first reason—was a reason why civil process could not be executed there, and both of them were reasons why ecclesiastical process should not be executed there, and why the Palace should be exempt from the ordinary jurisdiction of any archbishop or bishop. The two reasons play together, so to speak, upon the position of this palace; and I think it will be found, if one looks carefully at Lord *Coke's* language, that he mixes up in his language these two reasons, both of which are excellent reasons, why the palace should be exempt from ecclesiastical process. In the first place he says the king's palace at *Westminster* has this liberty and privilege, and after citing the case of *Bogo de Clare*, on which comment has been made, he goes on: "Here two things are principally to be observed, first that this royal privilege is not only appropriated to the Palace of *Westminster* but to all the king's palaces where his royal person resides; secondly, that this privilege is to be exempted from all ecclesiastical jurisdiction *ratione tam Regis dignatatis et corona suæ*, &c.," which by reference back contains implicitly an allusion to the liberties of the Church of *Westminster*. Although Lord *Coke* is no doubt speaking more especially of that exemption which depends upon the royal presence, he also in his language mixes up to some extent the consideration of the exemption derived from the fact that it was within the peculiar, the two things as regards *Westminster* being both true. Again, when one looks at the two cases to which Lord *Coke* refers, *Bogo de Clare's Case* (1) and the case cited later, *Nyerford's Case* (2), one finds that in both of them is the double ground taken. Now if those two things are the only grounds for

(1) Co. 4th Inst. p. 24; Prynne's Parliamentary Writs, p. 819.

(2) Co. 3rd Inst. p. 141; Prynne's Parliamentary Writs, p. 1189.

C. A. 1882 COMBE v. DE LA BERE. Bowen, L.J.

supposing that the palace is exempt, it seems to me that both of those grounds have gone. If, indeed, Mr. *Phillimore* could make out that there is a *tertium quid*, that this palace is not only exempt because the king lived there, and because it was within the peculiar of the Dean and Abbot of *Westminster*, but that there was a sort of third sanctity which attached to this palace, then he might succeed; but that is just where it seems to me the argument breaks down.

What possible ground can be assigned for believing that such an exceptional kind of sanctity attaches to *Westminster Palace?* It is suggested in argument that though as regards all other palaces their privilege may depend upon the residence, actual or constructive, of the king, Lord *Coke's* language justifies one in supposing that *Westminster Palace* stands as a sort of exceptional place, which has an exemption because it is *Westminster Palace*, and nothing else. I can find no justification for that either in authority or in reason. If *Westminster Palace* as a palace is exempt, then it is exempt on the same ground on which all other palaces are exempt, viz., that they are places where the king resides. As soon as the king ceases to reside at *Westminster*, it seems to me that the reason ceases and the privilege fails to apply.

It is not suggested that any exemption can any longer be claimed on the ground that it is a peculiar of the Dean and Abbot of *Westminster*. Later statutes have put an end to the possibility of that argument. The appeal therefore must be dismissed with costs.

Phillimore submitted that the Appellant ought not to pay two sets of costs. Lord *Penzance* and the promoter might have appeared together. [*Mackonochie* v. *Lord Penzance* (1); *Julius* v. *Bishop of Oxford* (2); *Mayor of London* v. *Cox* (3) were referred to.]

JESSEL, M.R.:—

I am afraid we cannot refuse Lord *Penzance's* costs. I wish we could. It is a great hardship on the Appellant to have to pay

(1) 6 App. Cas. 424. (2) 5 App. Cas. 214.
(3) Law Rep. 2 H. L. 239.

two sets of costs. I think an inquiry should be made at the Treasury whether the authorities there really ask for costs.

C. A.
1882
COMBE
v.
DE LA BERE.

Solicitors for Promoter: *Moore & Currey.*
Solicitors for Defendant: *Brooks, Jenkins, & Co.*
Solicitor for Lord *Penzance*: *The Solicitor to the Treasury.*

M. W.

GUINNESS *v.* LAND CORPORATION OF IRELAND.

C. A.
1882
CHITTY, J.
Nov. 13.
C. A.
Dec. 6, 11.

[1882 G. 2624.]

Limited Company—Memorandum of Association—Articles inconsistent with Memorandum—Application of Capital.

By the memorandum of association of a company limited by shares it was stated that the objects of the company were, the cultivation of lands in *Ireland*, and other similar purposes there specified, and to do all such other things as the company might deem incidental or conducive to the attainment of any of those objects, and that the capital of the company was £1,050,000, divided into 140,000 A shares of £5 each, and 3500 B shares of £100 each. By the 8th of the contemporaneous articles of association it was provided that the capital produced by the issue of B shares should be invested, and that the income, and so far as necessary the capital, should be applied so as to make good to the holders of A shares a preferential dividend of £5 per cent. on the amounts paid up on the A shares. Subject to this, the B fund was to belong to the owners of B shares. The profits of the company, after paying the £5 per cent. dividend to the A shareholders, were to be applied in payment of a non-cumulative dividend of £5 per cent. to the B shareholders, and the surplus was to be divided rateably between the A shareholders and B shareholders according to the amounts paid up on their respective shares:—

Held, by *Chitty*, J., and by the Court of Appeal, that article 8 was invalid, as it purported to make the B capital applicable to purposes not within the objects of the company as defined by the memorandum of association, and in a way not incidental or conducive to the attainment of those objects, and that the directors must be restrained from acting upon it.

The articles of association of a company cannot, except in the cases provided for by sect. 12 of the *Companies Act*, 1862, modify the memorandum of association in any of the particulars required by the Act to be stated in the memorandum.

THE *Land Corporation of Ireland, Limited*, was incorporated under the *Companies Act* on the 12th of July, 1882, as a company limited by shares. Clause 3 of the memorandum of association stated the objects of the company to be: (*a.*) "To acquire by

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND.

purchase, lease, or otherwise, lands and hereditaments in *Ireland*, and to hold, occupy, settle, let, underlet, mortgage, sell, or otherwise deal with the same." (*b.*) "To plant, stock, re-claim, improve, cultivate, and work lands and hereditaments in *Ireland*." (*c.*) "To acquire, purchase, breed, sell, and deal in all kinds of live-stock, cattle, horses, sheep, and animals." (*d.*) "To acquire, purchase, manufacture, sell, and deal in all kinds of goods, chattels, plant, stock, and effects." (*e.*) "To lend money to persons connected with Irish property." (*f.*) "To carry on the business of a land and financial company." (*g.*) "To carry on the business of cultivating and developing Irish estates." (*h.*) "To acquire or participate in by purchase or otherwise the goodwill of any business established for any of the above objects." (*i.*) "To unite with any other company formed for similar objects." (*j.*) "To enter into any arrangements for any of the above purposes." (*k.*) "To borrow money on security of the property of the company or otherwise." (*l.*) "To sell or dispose of any business carried on by the company." (*m.*) "And to do all such other things as the company may deem incidental or conducive to the attainment of any of the aforesaid objects of the company."

4. "The liability of the members is limited."

5. "The capital of the company is £1,050,000, divided into 140,000 A shares of £5 each, and 3500 B shares of £100 each."

The following are the material clauses in the contemporaneous articles of association:—

Art. 5. "The nominal original capital of the company is £1,050,000, divided into 140,000 A shares of £5 each, and 3500 B shares of £100 each."

6. "The board of directors shall forthwith allot and issue at par to the subscribers to these articles the number of shares which according to their subscription they respectively are entitled and have agreed to take, which shall be A shares, and subject thereto shall allot and issue the shares of the company at their discretion."

7. "The nominal original capital of the company, or so much thereof as shall have been issued from time to time, shall be held upon the following terms:—

(*a.*) "The holders of the A shares shall be entitled to a pre-

ferential cumulative dividend out of the profits, if any, of the company at the rate of £5 per cent. per annum on the amounts for the time being paid up in respect of the A shares, and such preferential dividend shall be further secured in the manner hereinafter provided. Subject to the payment of such preferential dividend the holders of the B shares shall be entitled to a non-cumulative dividend out of the said profits at the rate of £5 per cent. per annum on the amounts for the time being paid up in respect of the B shares. And the surplus profits in every year over and above such dividend shall be divisible rateably among the holders of the A shares and the holders of the B shares according to the amounts for the time being paid up in respect of such shares respectively.

(*b.*) "In the event of the company being wound up the capital produced by the issue of B shares remaining unapplied, and not required for payment of debts of the company, shall belong exclusively to the holders of the B shares, and be distributed among them rateably without prejudice to their right to share in any distribution of surplus of the other assets after payment of debts."

8. "The capital produced by the issue of B shares shall (subject to payment thereout of expenses hereby authorized to be so paid) as and when it is received by the company, be paid to the trustees of the company upon trust to invest or lay out the same in any securities approved by the trustees, or on deposit with or without security, with power to vary the same, and to apply the income, and if and so far as may be necessary from time to time, the proceeds of sale of capital forming the trust fund, or any part thereof, so as to secure and make good to the holders of the A shares the said preferential dividend at the rate of £5 per cent. per annum on the amounts for the time being paid up in respect of the A shares, and subject thereto in trust to apply the income of the trust fund for the time being remaining unsold, first in or towards replacing any capital previously sold, and secondly, in distributing the same, or the balance thereof, among the holders of the B shares rateably, and in the event of a winding-up of the company (subject to the liability to pay debts of the company) upon trust as to capital as well as income for the holders of the B shares

C. A. 1882

GUINNESS v. LAND CORPORATION OF IRELAND.

rateably and exclusively, and the said trust fund, or the income thereof, shall in no case be used as working capital of the company."

10. "The B shares shall be paid up by instalments of £10 each as follows: £10 per share upon application, and £10 per annum on the 1st day of June in each of the following nine years."

22. "The board of directors may from time to time in the exercise of their discretion make calls upon the members in respect of moneys unpaid on the shares other than B shares, which shall be paid up as hereinbefore provided." [Then followed provisions as to the maximum of calls, the interval between calls, and the time and places of payment.]

28. "No transfer of shares not being fully paid up shall be registered unless and until the transferee is approved by the board of directors. No transfer of B shares not fully paid up shall be registered."

90. "The board of directors shall conduct and manage all the business and affairs of the company, and shall exercise all the powers (including powers of borrowing and giving security) authorities and discretions of the company, except only those which are expressly by statute or these articles directed to be exercised by general meetings."

95. "The board of directors are authorized out of the funds of the company produced by issue of the B shares, to pay the necessary legal and other expenses of and incidental to the promotion, formation, and registration of the company, and all other preliminary expenses of the company."

101. "No dividend shall be payable except out of profits of the business of the company, or out of capital representing the B shares in respect of the security hereby made for the payment of the preferential dividend on the A shares."

The prospectus which was issued shewed in the plainest way the mode in which the B capital was to be dealt with according to the terms of the articles of association.

The B shares were all taken by persons interested in the formation of the company, and A shares only were offered to the public.

Doubts having been raised whether the application of the B

capital sanctioned by the articles would not be *ultrà vires*, as an application of capital inconsistent with the memorandum of association, the Plaintiff commenced this action on behalf of himself and all other the holders of B shares to restrain the company and the directors from making any further allotment of A shares upon the terms of the articles of association or of the prospectus, and from paying the capital produced by the issue of B shares, or any part thereof, to trustees upon trust to lay out the same in manner provided by the articles, so that the same and the income thereof should not be used as working capital, and from applying the B capital in payment of dividend on the A shares, and from doing any act to appropriate the B capital to objects other than those described in the memorandum of association, and moved for an injunction in those terms.

The motion came on for hearing before Mr. Justice *Chitty* on the 10th of November, 1882.

Ince, Q.C., and *H. B. Buckley*, in support of the motion, contended that having regard to the memorandum of association the article in question was wholly illegal and *ultrà vires*.

Macnaghten, Q.C., *Barber*, Q.C., and *Latham*, for the company, argued that there was no express provision in the *Companies Act* forbidding the payment of dividend out of capital, nor any express provision in the articles as to how the capital should be applied, and contended that the clause in question was not illegal.

The following authorities were referred to in the course of the argument:—*In re National Funds Assurance Company* (1); *Ashbury Railway Carriage and Iron Company* v. *Riche* (2); *Macdougall* v. *Jersey Imperial Hotel Company* (3); *In re Alexandra Palace Company* (4); *Holmes* v. *Newcastle-upon-Tyne Freehold Abattoir Company* (5); *Droitwich Patent Salt Company* v. *Curzon* (6); *Rance's Case* (7); *In re Dronfield Silkstone Coal Company* (8);

(1) 10 Ch. D. 118.
(2) Law Rep. 7 H. L. 653.
(3) 2 H. & M. 528.
(4) 21 Ch. D. 149.
(5) 1 Ch. D. 682.
(6) Law Rep. 3 Ex. 35.
(7) Ibid. 6 Ch. 104.
(8) 17 Ch. D. 76.

C. A. 1882

GUINNESS v. LAND CORPORATION OF IRELAND.

Harrison v. *Mexican Railway Company* (1); *Anderson's Case* (2); and *Duke's Case* (3).

Nov. 13. CHITTY, J.:—

This motion raises a question of great importance to the parties. I am satisfied that although the suit is a friendly one and is *bonâ fide* there is a legitimate contest between the parties, and in the interest of all it is one which it is desirable should be decided, and decided as speedily as possible.

The question turns upon the *Companies Act*, 1862, and the amending Acts of 1867 and 1877. There is no dispute with regard to the facts. The objects for which the company is established are stated as required by the Act of Parliament in the 3rd clause of the memorandum. It is not necessary for me to read through that clause. It is sufficient to say that the objects of the company are to buy land in *Ireland*, to sell land and to cultivate it, and the clause contains the usual provision that one of the objects is "to do all such other things as the company may deem incidental or conducive to the attainment of any of the aforesaid objects of the company." Before passing to the articles I should mention one other point in the memorandum. By the 5th clause (as also required by the Act) the capital of the company is stated to be £1,050,000 divided into £140,000 A shares of £5 each and 3500 B shares of £100 each. It is noticeable on the face of the memorandum that though the capital is thus divided into two portions, and one is called A and the other is called B, nothing is said as to the application of the capital A or capital B.

The material articles are those from 5 to 8 inclusive. The 5th article is this: "The nominal original capital of the company is £1,050,000, divided into 140,000 A shares of £5 each and 3500 B shares of £100 each." That is a mere repetition of the clause I have just read from the memorandum. Then the 7th article is this:—[His Lordship read the article.] Then there is a provision made for the division of the surplus. Then the 8th article is this:—[His Lordship read the article.] There are other clauses inserted merely to give effect to these two provisions. They are

(1) Law Rep. 19 Eq. 358. (2) 7 Ch. D. 75.
(3) 1 Ch. D. 620.

the 95th and the 101st, but it is not necessary that I should read them.

Now as to the intention of the 8th article, there can be no doubt. It is simply this, that the B fund, which consists of one-third of the total capital, is to form a guarantee fund for the payment to the A shareholders of what is called dividend, but what is plainly, on the face of these articles, intended to be interest.

In the case of *In re National Funds Assurance Company* (1), which came before the Master of the Rolls, the term "interest" was used, and he held that that meant, on the true construction of the articles, merely dividend. The dividend, of course, could only be paid out of the profits. It is undoubted then that the whole of the B capital is devoted, both income and principal, to the purpose of paying interest to the A shareholders. It was mooted whether the clause is severable. I do not think it is, for a very obvious reason. The income of the B fund, the £350,000, when the £350,000 is invested, would no doubt be income of the year; but the trading of the company with the £700,000 might result in a loss in any particular year equivalent to the sum derived by way of interest or income from the investment, and consequently the income of the B fund mentioned in this article is not necessarily profit. The capital of the B fund is expressly devoted to the payment of the interest on the A shares, and no distinction can, in my opinion, be drawn between those two parts of the clause, the one which relates to the income of the fund and the other which relates to the application of the capital. The B fund is not to be used as working capital of the company, in fact, it is made substantially a guarantee fund to the A shareholders.

Now upon this the question arises whether, having regard to the memorandum of association and the *Companies Act*, 1862, and the Amending Acts of 1867 and 1877, this scheme is lawful; it is not necessary to say whether what has been done could be done in some other way.

The question which I have to decide is whether upon the Act of Parliament, having regard to the memorandum, this article is legal

(1) 10 Ch. D. 118.

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND. Chitty, J.

or whether it is not illegal in the sense of being *ultrà vires* of the company. On the part of the Defendants it was said in argument that the Act of Parliament contains no express provision that the dividend shall not be paid out of capital, and that although there is an express prohibition in Article 72 of Table A, Table A contains merely articles of association, all of which, if adopted, are liable to be altered by special resolution under the 50th section of the Act. There is in the Act itself no clause in express terms forbidding the payment of dividend out of capital, but the Act of Parliament must be examined for the purpose of seeing whether the return of capital in a limited company in any form to the shareholders is or is not permitted. Again on the part of the Defendants it is said that there is no express provision as to how the capital shall be applied. That again is a true statement of the Act of Parliament so far as it goes, but the provisions of the Act of Parliament must be examined to see whether they do not in effect say how the capital of a limited company is to be applied.

Now the *Companies Act*, 1862, shews the terms on which persons who are desirous of forming a corporation with limited liability may cause themselves to be incorporated without applying to the Crown for a charter. The material sections are the 6th, 7th, 8th, 12th, 14th, 16th, 26th, and the 38th. Upon those sections, without going through all of them or the others (and there are others) which bear upon the point, I think I can state my view, at any rate, of the true effect of the Act of Parliament. The persons who form a company with limited liability are to contribute to the assets of the company, that is, to the capital of the company, a certain sum, and that is the measure of their liability. The 6th section enacts "any seven or more persons associated" (I will read the sections very shortly, and only what I consider material) "for any lawful purpose may by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Act in respect of registration form an incorporated company with or without limited liability." Then the 7th clause is this, "the liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the

amount, if any, unpaid on the shares respectively held by them," or limited in some other way which I need not mention. Then the 8th section, which relates to the memorandum of association of a company limited by shares, enacts that the memorandum of association shall contain amongst other things this: "the object for which the proposed company is to be established; a declaration that the liability of the members is limited; the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount." In contrast with that section, the 10th section should be read, which relates to the memorandum of association of an unlimited company. That section, although requiring that the object shall be stated, does not require the amount of the capital to be stated. The 12th section enacts, "any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association." Stopping there for a moment, and adopting the language of Lord *Cairns* in the case of the *Ashbury Railway Carriage and Iron Company* v. *Riche* (1), the memorandum of association is the charter of the company. The articles of association are the regulations for its internal management.

The memorandum of association is by the express provisions of the 12th section unalterable, except in the matters which are there specially mentioned, and except also as to those matters which are included in the Amending Acts of 1867 and 1877. The result therefore is this, that the company cannot alter by its articles the essential conditions of the memorandum, if they are those conditions which were required to be stated in the charter of incorporation by the Act of Parliament itself.

(1) Law Rep. 7 H. L. 653.

C. A.
1882
GUINNESS
v.
LAND
CORPORATION
OF IRELAND.
Chitty, J.

Now I will deal with the argument that there is no express provision as to the application of capital. I say there is in this way—you are bound to state your objects and your capital where your company is one of limited liability and the general law with regard to all corporations steps in and says that no corporation can apply its capital to any objects except those for which it is incorporated. Consequently I consider it is clearly enacted, though not in express terms, that the capital of a corporation must be applied to the objects of the corporation, and to no other purpose. The conditions of the memorandum are not mere paper conditions, they are intended to be operative, and it would be a most remarkable thing if the Act of Parliament which allows members to limit their liability by paying a sum of money to form the capital should allow those same persons the next day to receive back their capital in any shape. That is the length to which the contention on the part of the Defendants in this case must necessarily go. Here in the case before me the objects of the company are defined by the memorandum of association, and these objects do not include the return of a portion of the capital to the shareholders in the shape of what is termed "dividend." Whether such a clause would be good or not it is not necessary for me to say, but I have here an article which says that a portion of the capital may be returned to certain shareholders, and that seems to me to be contrary to the memorandum, and *ultrà vires* of the association, seeing that there is no provision in the memorandum of association itself according to which the capital can be so applied. It would be a strange construction of the Act of Parliament if by any of the internal regulations of the company it would be competent to the company to return any part of the capital to the shareholders, because the Act of 1867 contains elaborate and carefully framed provisions under which the capital may be reduced, and it seems to me an extravagant proposition to say that that relates only to the nominal capital and not to the actual subscribed capital. Indeed, in the Act of 1877 there is an expression to which I call attention merely as fortifying the conclusion to which I have arrived. By the 4th section it is provided that "where the reduction of the capital of a company does not involve either the diminution of any liability in respect of

unpaid capital or the payment to any shareholder of any paid-up capital," certain things are to be done, evidently shewing that the return of paid-up capital to the shareholders was considered to fall within the provisions of the Amending Act of 1867, and to be prohibited by the principal Act of 1862.

What I have stated generally as my view of the law with regard to the office of the memorandum and the articles of association is to be found expressed most clearly, and more fully perhaps than I should have thought it necessary to state it, in the speech of Lord *Cairns* in the House of Lords in the *Ashbury Railway Carriage and Iron Company* v. *Riche* (1). I will not read that speech at length, I will read only one or two passages with the view of shewing what Lord *Cairns*' opinion is, he says (2): "With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is so done is *ultrà vires*, not only of the directors of the company, but of the company itself." And after stating the 6th, the 8th, the 11th, and the 12th sections of the Act of 1862, and commenting upon them, he says (3), "Now, my Lords, if that is so,—if that is the condition upon which the corporation is established,—if that is the purpose for which the corporation is established,—it is a mode of incorporation which contains in it both that which is affirmative, and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified." Then he states the 14th section, and he mentions the 50th section, which enables the company to alter its regulations, that is, its articles, subject to the provisions of the Act, and to the conditions contained in the memorandum, still preserving the fixed and unalterable character of the provisions of the memorandum of association except in the particular respects in which the Act of Parliament enables them to be altered.

(1) Law Rep. 7 H. L. 653. (2) Law Rep. 7 H. L. 668.
(3) Law Rep. 7 H. L. 670.

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND. Chitty, J.

Then Lord *Cairns* refers to a provision which had crept into the articles of association in that case to this effect "an extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association, shall take place only in pursuance of a special resolution," and he states his opinion that if there had been such a resolution, which there had not in the particular case before him, it would have been entirely inapt and inefficacious. He says (1), "There was, in this 4th article, an attempt to do the very thing which, by the Act of Parliament, was prohibited to be done, to claim and arrogate to the company a power under the guise of internal regulation to go beyond the objects or purposes expressed or implied in the memorandum." The speeches of the other noble Lords in the same case are to the same effect and I need not refer to them. The exact point there was, whether a certain contract which had been entered into was or was not within the objects of the company as laid down in the memorandum. It was held it was not, and it was held that if the terms of the article which had been referred to had been complied with it would have been *ultrà vires*.

The other leading authorities on the subject I will now shortly mention, and they will be found I think to confirm the view of the Act of Parliament which I have taken. In the case of *Macdougall* v. *Jersey Imperial Hotel Company* (2), Lord *Hatherley* (then Vice-Chancellor), restrained the company incorporated under the Act of 1862 from paying dividends out of capital, there was no provision in the articles, and in that respect it is not a clear authority on the point now before me, but in giving judgment Lord *Hatherley* said, "On grounds of public policy, and on every principle not only of honesty as regards the public generally, but of the interests of this company itself, I feel bound to prevent this proceeding." I am reluctant to criticise the words of the judgment, but there is a portion of that statement which I disclaim, I do not think that I am concerned with the interests of this company, and I am not by any means sure if I were considering the interests of this company that I should not take a different view from that which I do. I make that observation for the purpose of saying merely that I am

(1) Law Rep. 7 H. L. 671.

(2) 2 H. & M. 528, 535. 10 Jur. N. S. 1043.

not acting on that ground nor on the ground of public policy, although Lord *Hatherley* says, "on every principle." But this is an important part, to my mind, of his judgment: "That is not in accordance with the contract entered into with the Legislature on behalf of the public, whereby it was determined that the shareholders should be liable to a certain defined amount, and no more, to the creditors of the company, and not in accordance with the contract between the parties whereby each shareholder was protected against creditors to the extent of the contributive liability of all the others." That second proposition appears to involve this, that if the dividends are paid out of capital to the shareholders in the winding-up the persons who receive it would be liable to repay. That portion of the judgment was cited with approval by Mr. Justice *Fry* in the case of *In re Alexandra Palace Company* (1), where he says that in his view what I have just read lays down the law with perfect precision, and he goes on to say (2), "I think no subterfuge by which it is attempted to return capital to shareholders, and thereby to diminish their liability, ought to be countenanced for one moment by this Court."

The point came before Vice-Chancellor *Hall* in the case of *Holmes* v. *Newcastle-upon-Tyne Freehold Abattoir Company* (3), and he granted an injunction, but in that case there was an article. In the case of *Droitwich Patent Salt Company* v. *Curzon* (4) it was held that the corporation, which had previously been a partnership with a power to reduce its capital, had by incorporating itself under the Act of 1862 lost that power. In the case of *In re National Funds Assurance Company* (5) the point raised was whether the directors were liable upon winding-up to refund that which they had paid to the shareholders, calling it dividend or interest, but which really came out of the capital of the company, and the Master of the Rolls held, that on the true construction of all the Acts taken together the term "interest," which was used in the article, did not mean more than "dividend," and that there was no power therefore on the part of the company

(1) 21 Ch. D. 149.
(2) Ibid. 160.
(3) 1 Ch. D. 682.
(4) Law Rep. 3 Ex. 35.
(5) 10 Ch. D. 118.

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND. Chitty, J.

(and of course not on the part of the directors) to pay the dividend out of the capital. He says (1), "If there was no power to do this thing vested in the directors, there was no power to do it at the shareholders' meeting. It must have been equally *ultrà vires* to give £5 per cent. out of capital back to the shareholders as to give the whole capital *uno flatu* by a single resolution of the meeting." I read that passage to shew that I cannot make (according to my view of the law applicable to this case) any distinction on the ground of the moderate interest which is proposed to be given to the "A" shareholders, namely, £5 per cent. If it is good for £5 per cent. it would be good for £50 per cent., or good for any percentage which speculative promoters in other cases might put into the articles of association. The Master of the Rolls' judgment shews that, in his opinion, a return of capital in the guise of dividend is not within the Act of Parliament, but is prohibited by it. In *Rance's Case* (2) there was an article under which dividends or bonuses might be paid out of assets. A director was held liable to refund what he had received in the shape of dividends on the ground that there was no proper balance-sheet, but the judgments of the Court, and particularly of Lord Justice *Mellish*, will be found to proceed on the footing that a dividend or bonus could only be paid out of the profits. *In re Dronfield Silkstone Coal Company* (3) is a case of considerable importance. There was an article there under which the directors were entitled to purchase shares. Upon the construction of that article the Master of the Rolls considered it warranted a general trafficking in shares, and held that the article was *ultrà vires*, first, on the ground that the trafficking was not within the memorandum of association, and, secondly, that it resulted in a reduction of the capital of the company in a way which was prohibited by the Act of Parliament. That is the effect of it. When the case came before the Court of Appeal a different view was taken upon the construction of the article, and they held that it did not authorize a general trafficking in shares, but likened it to the case of an article providing for forfeiture, or providing for surrender, and conceived it to be one which might fairly be inserted in the regu-

(1) 10 Ch. D. 126. (2) Law Rep. 6 Ch. 104.
(3) 17 Ch. D. 76.

lations of the company for the purpose of working the business of the company as part of its management. No doubt forfeiture clauses, surrender clauses, and properly-guarded clauses as to purchase of shares by the company, may result in the reduction of the capital, but that is not the object of such clauses, and though there was that incidental result in the *Dronfield Case*, the Court of Appeal upon the fair construction of the article held that it was not *ultrà vires*. It is not for me to say whether the Court of Appeal or the Master of the Rolls was right in the view they took of the facts in that particular case, but of course what the Court of Appeal has laid down is binding on me. I may observe that the result of the transaction in question in *In re Dronfield Silkstone Coal Company* (1) was the reduction of the capital to the extent of no less than one-third; yet still the Court of Appeal considered it to be a mere provision for the better management of the business of the company. Lord Justice *Cotton*, who was the first to give judgment in the Court of Appeal, says (2), "It was no part of the arrangement that the shares should be cancelled; they were given up to the company so that they could be re-issued." He also says (3), "There has been no reduction of the capital as fixed by the memorandum, there has merely been a purchase of shares which can be re-issued." I do not understand the Lord Justice to say that the only reduction of capital which is aimed at by the *Companies Act* is a reduction of the nominal capital, or that the clause in the articles under which the capital could be returned was good, on the ground that where money which has been paid up is returned there would be no reduction of the nominal capital. I say that because there is also this statement of the Lord Justice (4): "No doubt a company cannot restore capital to its members, for if they were to receive back what they had paid on their shares, they would be in the same position as if they had not paid it, and would be liable for calls." He also deals with the point of an article authorizing the trafficking in shares being *ultrà vires* if there is no clause in the memorandum which authorizes it, and I understand his opinion to be that an article which alters the scope of the business or

(1) 17 Ch. D. 76.
(2) Ibid. 93.
(3) 17 Ch. D. 95.
(4) Ibid. 94.

C. A. 1882

GUINNESS v. LAND CORPORATION OF IRELAND.

Chitty, J.

proposes to alter the scope of the objects for which the company is established would be *ultrà vires*.

I have now gone through the leading cases, but I desire to mention one or two other cases to shew that they have not escaped my attention. In *Harrison* v. *Mexican Railway Company* (1) the Master of the Rolls said that the articles of association and the memorandum being contemporaneous, where the memorandum was silent the articles might make a provision (as he held the articles in question had done) for the issue of preference shares, and that there was no inconsistency in such a case between the articles and the memorandum. In *Anderson's Case* (2) it was held that as to the shares which were mentioned in the memorandum a provision might be maintained in the articles that certain of them should be deemed to be fully paid-up shares. Those two cases mark a limit, and there is this other limit which the Court has applied, that if you put into your memorandum of association conditions which are non-essential, in other words, which the Act of Parliament has not required to be put there, you may alter them. That was decided by the Master of the Rolls in *Duke's Case* (3).

Now I have stated what I consider to be the law derived from an examination of the Act of Parliament and the authorities bearing on the subject, and I have arrived at the conclusion that the 8th article is *ultrà vires*. I may say that I regret the decision at which I have arrived in this sense. Counsel, in opening the motion for the Plaintiffs, spoke of the impropriety of the article. When that was pressed and when that expression was used by him I do not think he meant more than that it was improper in the sense of it being illegal, but I have nothing to do with the propriety or impropriety of the articles except in that sense. What has been attempted to be done here is perfectly honest and perfectly legitimate if the Act of Parliament will allow it, and I have already said it may be there is some other mode of effectuating the object which the parties have in view; but it would be improper for me to express any opinion as to that. What I have to do is, of course, to decide upon the facts as they

(1) Law Rep. 19 Eq. 358. (2) 7 Ch. D. 75.
(3) 1 Ch. D. 620.

stand. I must grant the injunction, which may be in the terms asked. I take it that the costs are arranged, and that I need say nothing about them.

G. M.

C. A. 1882

GUINNESS v. LAND CORPORATION OF IRELAND.

C. A.

The Defendants appealed. The Appellants were heard on the 6th of December. The Respondents concluded their arguments and the Appellants replied, on the 11th of December, 1882.

Macnaghten, Q.C., *Barber*, Q.C., and *Latham*, for the Appellants:—

The scheme embodied in the articles is no doubt honest and legal, and no concealment was practised; neither shareholders nor creditors could be deceived, for the prospectus fully set forth the scheme. Mr. Justice *Chitty* however held the scheme to be *ultrà vires* on two grounds: first, that the application of the B capital in the way proposed was in contravention of the memorandum; and secondly, that it was a reduction of capital.

As to the first point, Mr. Justice *Chitty* says that the scheme is legitimate and honest and is unobjectionable if the Act will allow it.

[COTTON, L.J.:—I understand him to say that it is bad as an application of capital to objects not mentioned in the memorandum.]

To determine whether this is an object not within the memorandum, the memorandum must be read not putting a strained construction on it. In *Ashbury Railway Carriage and Iron Company* v. *Riche* (1), the effect of which was much discussed in *Attorney-General* v. *Great Eastern Railway Company* (2), the company were manifestly travelling out of their objects, and in the latter case it is laid down that the Courts are not to be astute in holding the acts of directors to be *ultrà vires*. This is especially the case where there is a clause enabling the company to do whatever it shall consider incidental or conducive to attaining its objects. If, indeed, an act is plainly *ultrà vires* it cannot be treated as authorized because the company says it is incidental or conducive to the objects, but if there is any doubt the Court

(1) Law Rep. 7 H. L. 653. (2) 11 Ch. D. 449; 5 App. Cas. 473.

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND.

will lean to holding it *intrà vires*. *Simpson* v. *Westminster Palace Hotel Company* (1) and *In re Peruvian Railways Company* (2) are strong instances of this. The string of cases referred to by Mr. Justice *Chitty* were cases under sect. 165 relating to misfeasance.

[COTTON, L.J.:—Do they not go on the ground that the acts were *ultrà vires*, and therefore acts of misfeasance?]

In two of them, *Macdougall* v. *Jersey Imperial Hotel Company* (3) and *Rance's Case* (4) there was *mala fides*. In the case of *In re National Funds Assurance Company* (5) the Master of the Rolls appears to intimate that if the articles had authorized payment of dividends out of capital it would have been right.

[COTTON, L.J.:—He appears to me hardly to have considered the question whether if the articles had purported to give such an authority that would have been sufficient. He disposes of the case by saying that the articles did not purport to give it.]

Anything fairly incidental to the business may be done if not prohibited, and we say that here there is no prohibition. The *Companies Clauses Act*, 1845, prohibits paying dividends out of capital, but the *Companies Act*, 1862, contains no such prohibition. Such a prohibition is contained in Table A, but a company is not bound to adopt Table A, and if it does it can alter it by special resolution. The payment of dividends out of capital cannot, therefore, be deemed to be forbidden by the *Companies Act*. The memorandum mentions A and B shares as distinct. This would lead any one to look at the articles to see what the distinction is, and on referring to them we find these provisions, which are not inconsistent with the memorandum but supplement and explain it, as in *Anderson's Case* (6). *Harrison* v. *Mexican Railway Company* (7) shews that an implication from the memorandum may be rebutted by the cotemporaneous articles. Mr. Justice *Chitty* said that the capital must all be employed for the objects of the company, but that is not strictly correct. Money has always to be expended in advertising and other incidental expenses.

(1) 2 D. F. & J. 141; 8 H. L. C. 712.
(2) Law Rep. 2 Ch. 617.
(3) 2 H. & M. 528.
(4) Law Rep. 6 Ch. 104.
(5) 10 Ch. D. 118, 125.
(6) 7 Ch. D. 75.
(7) Law Rep. 19 Eq. 358.

As to there being a reduction of capital, reduction of capital means a permanent reduction of the nominal capital of the company: *In re Dronfield Silkstone Coal Company* (1), and there is nothing of that kind here.

Ince, Q.C., *contrà*:—

Sect. 12 of the Act requires that the objects of the company and the amount of the capital shall appear in the memorandum. The manifest intention is that the capital shall be applied for those objects only. Here the articles introduce the provision that the B capital shall not be employed as working capital, but shall form a fund for guaranteeing a dividend on the A shares. It is a fraud on the Act to provide by the articles that a large portion of the capital shall not be applied for the objects specified in the memorandum. *Anderson's Case* (2) and *Harrison* v. *Mexican Railway Company* (3) dealt with matters within the scope of the memorandum. The observations of Lord *Cairns* in *Ashbury Railway Carriage and Iron Company* v. *Riche* (4) are in our favour, and they dispose of the argument that *bona fides* cures the defect. *Atwool* v. *Merryweather* (5) is also in our favour. The capital must be employed for the purposes of the company and cannot be returned.

[COTTON, L.J.:—This is hardly a return, as it is not repaid to the persons who paid it. The question is whether it is not a misapplication of capital. Which is the first case in which the payment of dividends out of capital was restrained?]

Macdougall v. *Jersey Imperial Hotel Company* (6) is one of the first and *Flitcroft's Case* (7) the last.

[COTTON, L.J.:—I understand Mr. Justice *Chitty* to have decided that this was an object of the company not mentioned in the memorandum. May it not be considered to be mentioned when there is a distinction made in the memorandum between A and B shares?]

There is nothing in that reference to A and B shares to lead to

(1) 17 Ch. D. 76.
(2) 7 Ch. D. 75.
(3) Law Rep. 19 Eq. 358.
(4) Law Rep. 7 H. L. 653.
(5) Ibid. 5 Eq. 464, n.
(6) 2 H. & M. 528.
(7) 21 Ch. D. 519.

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND.

the conclusion that the whole capital is not working capital of the company. Now as to the scope of the Act, sect. 6 shews how the company is to be incorporated. Sect. 7 shews the limit of liability, and holds out the capital as a security to the creditors. A provision in the articles which enables one class of shareholders to take for their own benefit capital subscribed by the others is a wrong to the creditors. Sect. 8 prescribes what the memorandum is to contain, and by sect. 12 the memorandum cannot be varied or departed from except in certain specified particulars, which have no bearing on this case. Sect. 22 treats a share in the capital as equivalent to a share in the company. Now according to the present scheme the B shareholders are not shareholders in the company at all, their contributions being made an outside guarantee fund. Sect. 26 provides for a list of members, the object of which is to enable outsiders to know the position of the company. If this scheme is legal the list is a delusion. A return may be made that all the B capital has been paid up; but it may all have gone into the pockets of the A shareholders, whereas the return would lead creditors to believe that the company had got the sum called up, in meal or in malt. Under the Act of 1862 no part of the capital could be returned, nor can it be returned under the Acts of 1867 and 1877, unless the creditors are paid off or consent. Now as to the authorities, payment of dividends out of capital has been held a reduction of capital: *Macdougall* v. *Jersey Imperial Hotel Company* (1); *Flitcroft's Case* (2); and is so *ultrà vires* that it cannot be ratified, as was there decided. In the case of *In re Dronfield Silkstone Coal Company* (3) there was no reduction of capital, for the shares could be re-issued. Payment to shareholders out of capital was held illegal in *In re National Funds Assurance Company* (4) and *Holmes* v. *Newcastle-upon-Tyne Freehold Abattoir Company* (5). *Droitwich Patent Salt Company* v. *Curzon* (6) shews how inconsistent a reduction of capital is with the nature of a limited company; and *Dent's Case* (7) is strong on the illegality of a return of capital. It

(1) 2 H. & M. 528. 10 Jur. N.S. 1065.
(2) 21 Ch. D. 519.
(3) 17 Ch. D. 76.
(4) 10 Ch. D. 118.
(5) 1 Ch. D. 682.
(6) Law Rep. 3 Ex. 35.
(7) Law Rep. 8 Ch. 768.

cannot make any difference that a return of capital enures only to the benefit of part of the shareholders, the capital is reduced all the same.

H. B. Buckley, with him :—

As to the functions of the memorandum and the articles the difference between sects. 8 and 10 furnishes a key to the meaning of the Act. Where a company is limited, the amount of capital must be stated, where the company is unlimited it need not. The reason is that where a company is unlimited it does not signify to creditors what the capital is, but where it is limited the capital is the fund to which the creditor has to look for payment. The statement of this is essential to the incorporation. The provisions as to the articles begin at sect. 14, and they provide for the internal regulation of the company. Sects. 50 and 51 give power to alter the articles—calling them "regulations." It was intended that the memorandum should contain everything with which a creditor is concerned, and there is no power to alter it, the articles are only to work out what is contained in the memorandum.

[COTTON, L.J. :—There is no question as to the nature of the distinction between the articles and the memorandum. The difficulty here is that a difference between A and B shares is made in the memorandum.]

In *Ashbury Railway Carriage and Iron Company* v. *Riche* (1) are strong observations as to the unalterable character of the memorandum. The test we submit is whether the matter is one as to which it is material for creditors to be informed, if not the articles may explain the memorandum, but if it concerns creditors the memorandum alone is to be looked to. Now the division of profits is a matter with which creditors having nothing to do, and on that ground in *Harrison* v. *Mexican Railway Company* (2) the articles were read to explain the memorandum, but that does not help the Appellants in a case where the question is as to dealing with capital. In *Hutton* v. *Scarborough Cliff Hotel Company* (3) it was held that the company could not by special resolutions

(1) Law Rep. 7 H. L. 653. (2) Law Rep. 19 Eq. 358.
(3) 2 Dr. & Sm. 514; 4 D. J. & S. 672.

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND.

authorize the issue of preference shares, because it was inconsistent with the memorandum. Now is the scheme embodied in art. 8 an object of the company? We have here, in fact, two companies, the object of one of which is to guarantee the dividend in the other. This is not one of the objects in the memorandum. Is it then something conducive to attaining those objects?

[COTTON, L.J.:—We will not trouble you on that.]

Then as to reduction of capital. In consequence of the decision of the Master of the Rolls in *In re Ebbw Vale Steel, Iron, and Coal Company* (1), the *Companies Act*, 1877 (40 & 41 Vict. c. 26), was passed. Sect. 3 of that Act proceeds on the footing that but for that Act and the Act of 1867 capital could not be paid back. It has been said that *In re Dronfield and Silkstone Coal Company* (2) is inconsistent with *Hope* v. *International Financial Company* (3), but in the latter the case came to this dilemma, either the shares could be issued again, in which case the transaction was a trafficking in shares, or they could not be issued again, in which case there was a reduction of the capital. The point as to trafficking in shares was not decided.

[BOWEN, L.J.:—I think that the *ratio decidendi* in the *Dronfield Case* is that it was not trafficking in shares?]

Here the money if paid to the A shareholders is gone, and cannot be recovered.

Macnaghten, in reply:—

The 121st section of the *Companies Clauses Act*, 1845, expressly prohibits reduction of capital by payment of dividends out of it, but allows a return of capital with certain consents. In the Act of 1862 there is no such prohibition. There is such a prohibition in Table A, but the company can by special resolution alter anything in Table A, so there is express authority to alter that prohibition. Under the *Companies Act* such a payment can only be impeached on this ground, that the liability of a shareholder extends to the amount unpaid on his shares, and that what he

(1) 4 Ch. D. 827. (2) 17 Ch. D. 76.
(3) 4 Ch. D. 327.

has received back he must be considered not to have paid. The Act shews that the articles are the proper place for the prohibition.

[BOWEN, L.J.:—In what case do you say that dividends could properly be paid out of capital?]

It would be difficult and is not necessary to lay down any rule on that subject. In the present case, if we take this application of the B capital to be one of the objects of the company, which must be mentioned as such in the memorandum, the A shareholders might do nothing, and continue receiving a dividend out of the B capital without working the business of the company at all. What is said in *Ashbury Railway Carriage and Iron Company* v. *Riche* (1) must be construed with reference to the facts of the case. In that case what was being done was clearly outside the memorandum, and in applying the rules there laid down, regard must be had to the observations of Lord Justice *James* in *Attorney-General* v. *Great Eastern Railway Company* (2), which are expressly approved by Lord *Selborne* in the same case (3), to the effect that the doctrine of *ultrà vires* must be reasonably applied. As regards the clauses of the *Companies Act* the company under sect. 4 must be formed for carrying on a business. If two companies were formed, as suggested by the Respondents, the B company would not be a company formed for carrying on a business at all. "Objects" means the business of the company, and in the forms to the Act the nature of the business is stated very concisely. Many things come within the scope of the company's powers which are not mentioned in the memorandum, and which cannot be called objects of the company, except as incidental to its operations, as for instance, advertising, without which they could not get shareholders. Now without doubt the directors might spend money in that, and the present case is analogous. The 12th section prohibits the altering the memorandum as regards the statement of capital, but the memorandum only mentions the nominal capital, and that is not altered by the articles.

(1) Law Rep. 7 H. L. 653. (2) 11 Ch. D. 449, 480.
(3) 5 App. Cas. 478.

C. A. 1882

GUINNESS v. LAND CORPORATION OF IRELAND.

COTTON, L.J.:—

This case is of very great importance, and but for the full argument that we have heard, and the interval of time that has elapsed, we probably should have reserved our judgment.

The company was formed with the general object, as appears from its memorandum of association, of cultivating land in *Ireland*. The memorandum, as required by the *Companies Act*, 1862, then states that the liability is limited, and what the capital of the company is to be. It states that it is to be £1,050,000 divided into 140,000 A shares of £5 each, and 3500 B shares of £100 each. Both A and B shares are referred to generally as capital of the company without anything to intimate that either the A or B shares were to be different from the capital generally so described. I will consider afterwards what is the meaning of "capital" in the memorandum of association.

The question before us turns on the 8th clause of the articles of association, which provides that the capital produced by the issue of B shares shall, so far as is necessary, be applied in making good to the holders of A shares the preferential dividend of £5 per cent., which they are to receive on the amounts paid up on their shares. [His Lordship read the clause.]

This action is brought by one of the B shareholders on behalf of himself and the others, to restrain the directors from issuing any A shares on the footing of their being entitled to the benefit of that article, and to restrain the directors from applying in accordance with it the capital arising from the B shares. Now I may say here once for all that everything done by the promoters has been done with the utmost fairness. What they proposed to do was fully stated in the prospectus which they issued, and I have no doubt that article 8 was inserted perfectly *bonâ fide* for the purpose of securing what they thought was under the circumstances for the benefit of this company. If the Appellants here had urged the point, I should have felt a difficulty in interfering at the instance of a B shareholder who had taken his shares on the footing of the prospectus with full knowledge of what the articles were, and of what was the intended application of the B capital. The Appellants, however, have not relied upon that, but desire to have the decision of the Court upon the

validity of clause 8, and that being so, I think it is not necessary for the Court to raise the objection.

Now *primâ facie* the application of the capital arising from the B shares in payment of a dividend of £5 per cent. on the A shares, is applying that fund for something different from the business (to put it in that way first of all) which is authorized by the memorandum of association. It was urged that this difficulty is removed by the words which occur in the memorandum, "and to do all such other things as the company may deem incidental or conducive to the attainment of any of the aforesaid objects of the company." We did not hear the Respondents upon that point, and in my opinion that clause cannot assist the Appellants. It was urged that the company had, in the most decisive way, shewn their opinion by the articles that this application of the B capital was incidental and conducive to the attainment of the objects of the company, and that therefore it came within these words. The short answer to that argument is this, that this application of B capital is not incidental or conducive to the attainment of the objects previously specified, viz., the cultivation of land in *Ireland*, and the other objects mentioned in the memorandum, but was devised for the purpose of inducing persons to take shares in a company formed for the attainment of those objects.

I will mention two of the cases that were referred to as to the effect of these general words. One is *Simpson* v. *Westminster Palace Hotel Company* (1), in which a company was formed to start what was then a novelty, a very large hotel. The directors agreed to let part of the hotel for three years to the Secretary of State for *India*, and it was held that this came within the description of something incidental or otherwise conducive to the attainment of the objects of the company. It was not known whether such a large hotel could at once obtain such an amount of business as to make it profitable, and it was considered that letting part of it for a short time to a public board might attract what was essential to an hotel, customers and good will. The agreement for letting, moreover, provided for something which is incidental to carrying on the business of an hotel, for it gave the

(1) 2 D. F. & J. 141; 8 H. L. C. 712.

C. A. 1882 — GUINNESS v. LAND CORPORATION OF IRELAND. — Cotton, L.J.

company the monopoly of supplying the demised premises with provisions, wines, and liquors. The decision, as I understand it, was that entering into such an agreement for a short time was not embarking the capital of the company in anything at variance with the objects of the company, but was merely a means of getting customers, and was in fact conducive to carrying on in that large building the business of an hotel keeper. In the other case, *In re Peruvian Railways Company* (1), there was no power given expressly to draw bills of exchange; but it was held that the directors had, under such a clause, power to draw them, for that this was a mode of providing for payment of their engagements while they were calling up their capital, and fairly came within the description of being conducive to carrying on the business of the company. Here the arrangement is, without limit as to time, to apply the B fund for the purpose of providing a dividend for the A shareholders, which is an entirely different case.

Then it was said that independently of that clause we ought not to limit too strictly the powers of these large companies in carrying on their business, and the judgment of Lord Justice *James* in *Attorney-General* v. *Great Eastern Railway Company* (2) was relied on. But that case was essentially different from the present. The *Great Eastern Railway Company* there was doing something which was not strictly within the objects of its incorporation, viz., supplying and letting on hire rolling stock to another company, but as it was only supplied for a railway which could only be effectively worked in conjunction with their railway, what they did was for the purpose of providing for the traffic going over both railways, which was within their objects. The observation of Lord Justice *James* comes only to this, that in such a case the directors have and ought to have a very large discretion as to the mode of attaining the objects of the company. Here the application of the B capital is not for the purpose of carrying on the business, but of inducing persons to come in and subscribe the A capital with which the company was to carry on the business.

That being so, we must see whether the effect of the memo-

(1) Law Rep. 2 Ch. 617. (2) 11 Ch. D. 449, 477.

randum of association, having regard to the articles, is such as that the directors are acting *ultrà vires* in applying the B capital as they propose. It is necessary shortly to refer to the enactments as to a memorandum of association. Under sect. 6 of the *Companies Act* any seven persons by signing a memorandum of association can incorporate themselves. It is not necessary, except in the case of a company limited by guarantee or unlimited, that there should be articles of association; but the memorandum is essential for the purpose of the incorporation of the company. Then sect. 12 says that except in certain points there mentioned (which have no bearing on the present case) it shall not be in the power of the company in any way to alter the memorandum of association.

Then we come to this. The Act requires the memorandum to state the objects of the company and the amount of capital with which the company proposes to be registered. What is the meaning of the word "capital," and what is the effect of the statement of the amount of capital in the memorandum, having regard to the other sections of the Act? We have first to ascertain what is meant by "capital," and to my mind sect. 38 as to the liability of members is of the utmost importance as a guide to answering that question. That section provides that in the case of a company limited by shares being wound up, no contribution shall be required from any member exceeding the amount if any unpaid on the shares in respect of which he is liable as a present or past member; that the capital of the company as mentioned in the memorandum is to be the fund which is to pay the creditors in the event of the company being wound up. From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid. In former days proceedings could be taken against members of a company, but under the present law a creditor has no remedy except execution against the goods of the

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND. Cotton, L.J.

company, or winding-up proceedings. If a winding-up order is made each shareholder is liable to contribute the amount not paid up on his shares, including what if anything he has had returned. It follows, as I have said, that no part of the capital mentioned in the memorandum can be taken out of the fund to which the creditors have to look except for the purpose of employing it for the objects of the company. We have then to consider whether the provision in art. 8, which takes away part of that which is described as capital, can vary the case. The argument for the Appellants, as I understand it, is this—here we have two classes of shares, A and B shares, mentioned in the memorandum, that necessarily requires some explanation, and then for the purpose of controlling what would otherwise be the effect of the memorandum of association we must look to the articles which define what the A and B shares are. In my opinion that argument cannot prevail. If there were anything in the memorandum which shewed that the B capital was not to be capital in the ordinary sense as a fund to be applied in carrying on the business of the company as defined in the memorandum of association, but that it was to be (what here it is clearly) a guarantee fund for securing dividends to the A shareholders, the matter would stand very differently, but no one from the mere statement that there were A and B shares would expect anything more than that there was some difference as regards priority between the A shareholders and the B shareholders, treating both as shareholders holding capital in the company. Now the articles cannot in my opinion alter or vary that which would be the result of the memorandum standing alone. A special resolution cannot alter the memorandum in any way, and in my opinion (though the case may be different where, as may sometimes happen, the memorandum introduces something which the Act does not require to be stated in it), that which is required by the Act to be provided for, and is provided for in the memorandum, can no more be altered by the articles than by a special resolution. There are, indeed, some observations of the Master of the Rolls which might seem to militate with that position. One case referred to on this point was *Harrison* v. *Mexican Railway Company* (1).

(1) Law Rep. 19 Eq. 358.

The decision does not in any way affect what I have been laying down, because the question there dealt with was the mere question of giving priority to the dividends payable to a certain class of shareholders. That is a matter which the Act does not require to be dealt with in the memorandum, and it was not dealt with by the memorandum in that case. But there is an expression of the Master of the Rolls which was much relied upon, and which occasions some little difficulty (1): "If the memorandum of association is silent upon the subject of the terms of the original contract under which the company was formed, then there is an implied condition that all the holders of shares are entitled to rank equally as regards dividend, without any preference or priority between themselves; but if it does clearly appear upon the articles of association that that was not the meaning of the original contract, then there is no such implication of law as to the meaning of the memorandum of association, that implication being rebutted by the clear terms of the contemporaneous instrument." I think that there the Master of the Rolls was referring to matters which the Act does not require to be stated in the memorandum. But in reality it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners, unless their contract has provided the contrary. Here, in my opinion, the memorandum of association being required to state the objects of the company, and to state the capital with which those objects are to be carried into effect, there is from the Act of Parliament, and from the memorandum itself, not from the mere position in which the parties stand as partners, an implication that the capital is not to be applied to any other purpose than the business mentioned in the memorandum. I think that the Master of the Rolls did not intend to say anything which militates against my view of the law, though perhaps his observations require a little verbal correction.

As regards *Anderson's Case* (2) the Master of Rolls expressly says (3): "I am not now speaking of those portions of the memorandum of association which the Act of Parliament requires to be

(1) Law Rep. 19 Eq. 365.
(2) 7 Ch. D. 75.
(3) 7 Ch. D. 99.

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND. Cotton, L.J.

stated in the memorandum. Something might be said on that question, but all the Act of Parliament requires to be stated is the amount of capital for which the company is proposed to be registered divided into shares of a fixed amount. It does not prevent your stating that the shares are to be paid for partially in money and partially in property, or even partially in property or partially in remuneration for services." He there confines his observations as to the purposes for which the articles can be looked to to those matters which are not required by the Act of Parliament to be stated in the memorandum of association, and as regards those conditions which the Act of Parliament does require to be stated in the memorandum, the articles cannot, in my opinion, be referred to for the purpose of modifying or qualifying them.

The only other case to which I need refer is *In re Dronfield Silkstone Coal Company* (1). That was an entirely different case. The articles gave the directors a discretionary power to expend the capital of the company in buying its own shares. It was decided in the Court below that this article was invalid upon two grounds, that it enabled the company to traffic in shares, which was engaging in a new business, and that it authorized a reduction of capital. The Court of Appeal was of a contrary opinion on both those points. The article there empowered the directors in their discretion to apply money in purchasing shares so as to get rid of shareholders who caused difficulty in the internal management of the company, and as the power had been used, and reasonably used for that purpose, and not as a means of diminishing the capital of the company, the shares not being in any way cancelled or put an end to, but being re-issuable, we were of opinion that the directors had the power which they purported to exercise. In the present case there is no discretion, but the A shareholders, if the article in question is valid, have an absolute right to insist on payment of dividends out of the B capital until it is exhausted, if there is no other fund to pay them.

In my opinion, therefore, the Plaintiff is entitled to the injunction which he asks.

(1) 17 Ch. D. 76.

BOWEN, L.J.:—

I have arrived at the same conclusion without any doubt, but not without some regret, because the effect of our decision is to prevent this company from doing that upon the expectation of doing which everybody has subscribed his money. The question is whether what is sought to be done has been prohibited by the Legislature, and I am of opinion that it has.

The prohibition which I think bars the way to the carrying out of this scheme is contained in sect. 12 of the *Companies Act* of 1862, which prevents companies from making any alteration in the conditions contained in their memorandum of association.

Now it is not necessary in the year 1882 to point out the important distinction that obtains between the memorandum of association and the articles of association. A company which registers itself under the Act of 1862 as a company limited by shares can only obtain vitality by complying with the conditions which the Legislature imposes. The Act has prescribed in the first place with regard to such companies that although they have, subject to certain exceptions, power to decide on their own internal regulations, there shall be certain fixed conditions by which they are bound as regards the outside world.

In the first place, a company limited by shares must in its memorandum, according to sect. 8, set forth the objects for which it is to be established, and also the amount of capital with which it proposes to be registered divided into shares of a certain fixed amount. When dealing with the registration of unlimited companies the Legislature in sect. 10 only insists upon the registration of the objects for which the company is to be established, and the liability being unlimited, there is no provision as to stating the amount of capital. When we turn to sect. 38 it is plain what the reason for that difference is. It is that in the case of a company where the liability is limited the capital of the company is to be a fund for carrying on the business of the company in the first place, and also a fund from which the creditors of the company may expect to obtain payment of their demands.

Now it seems to me that taking those three sections together, only one interpretation can be put upon sect. 8, namely, that in the case of a company which registers under that section the

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND. Bowen, L.J.

company is *ipso facto* precluded from devoting any of its capital to any other objects than those stated in the memorandum of association. It seems to me that the collocation of the two things, the compulsory statement of the objects of the company in the first place, and the compulsory statement of the capital in the second place, produces at once the legal obligation that the company shall devote to those objects alone the capital which is subscribed, and I think that the other sections of the Act are based upon the assumption that this is so. This view will, I think, be found to be recognised by almost all the authorities which bear upon this part of the *Companies Act*. In *Ashbury Railway Carriage and Iron Company* v. *Riche* (1) it was assumed to be true. In *Flitcroft's Case* (2) it is so expressly stated by the Master of the Rolls and by Lord Justice *Cotton*. The Master of the Rolls says (3): "A limited company by its memorandum of association declares that its capital is to be applied for the purposes of the business," and Lord Justice *Cotton* says (4): "A payment of dividends out of capital is contrary to the constitution of the company, and is incapable of ratification."

There are a number of cases, which may be called near the line, where a company has not been prevented by the Court from devoting a portion of its funds to purposes which though not expressly mentioned in the memorandum of association may nevertheless be taken to be incidental to the purposes of the company. *Simpson* v. *Westminster Palace Hotel Company* (5) is one of these cases. All of them will turn out upon examination to be cases where what was being done was strictly incidental to the carrying on of the business of the company. I agree with the remarks of Lord Justice *Cotton* as to the *Dronfield Silkstone Coal Company's Case* (6). Although it does not at first sight appear to be upon the same kind of point as the present, it seems to me to be founded on the same view of the Act, for Lord Justice *James* uses this language: "The memorandum limits the objects of the company, and so prevents trafficking in shares." It seems to me

(1) Law Rep. 9 Ex. 224; 7 H. L. 653.
(2) 21 Ch. D. 519.
(3) Ibid. 533.
(4) 21 Ch. D. 536.
(5) 2 D. F. & J. 141; 8 H. L. C. 712.
(6) 17 Ch. D. 76.

that the reason why trafficking in shares is illegal is because it is at variance with the fundamental statements of the memorandum of association.

We have then to consider the argument that the Court may turn to the articles of association to see if they do not, so to say, supplement the memorandum, and for this particular purpose admit of being read with it. I shall only say a few words as to how far, in my opinion, the articles of association may be looked at and read together with the memorandum of association. I do not agree that the 5th sub-section of the present memorandum contains enough to give any indication that the articles of association are to be looked to, even if that made any difference; and, that being so, we are thrown back upon the question how far as a general rule you may turn to the articles? There is an essential difference between the memorandum and the articles. The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors, and the outside public, as well as of the shareholders. The articles of association are the internal regulations of the company. How can it be said that in all cases the fundamental conditions of the charter of incorporation, and the internal regulations of the company are to be construed together. *Harrison* v. *Mexican Railway Company* (1) was cited as shewing that the Master of the Rolls was willing to read the two together, but the distinction is obvious that in that case the matter was one with which the creditors had no concern whatsoever. In any case it is, as it seems to me, certain that for anything which the Act of Parliament says shall be in the memorandum you must look to the memorandum alone. If the Legislature has said that one instrument is to be dominant, you cannot turn to another instrument and read it in order to modify the provisions of the dominant instrument.

Mr. *Macnaghten* went on to urge that if the directors of the company are prevented from devoting capital to the payment of dividend, it is only by an accident of legislation, by reason of the presence of sect. 38 of the Act of 1862, and he said that if you

(1) Law Rep. 19 Eq. 358.

C. A. 1882 GUINNESS v. LAND CORPORATION OF IRELAND. Bowen, L.J.

contrast with the *Companies Clauses Act*, 1845, which expressly prohibits payment of dividends out of capital, the provisions of the *Companies Act*, 1862, which contain no such prohibition, but authorize the company to modify any of the internal regulations contained in table A at the end of the Act, and then if you turn to table A and find that it contains an internal regulation that the dividends are not to be paid out of capital, it cannot be considered a fundamental condition of the incorporation of the company that it shall not pay dividend out of capital, and that cases may be conceived in which it might be lawful to do so. It is always unwise for a Judge to pronounce an opinion about anything outside the particular area which is under discussion, and I am not prepared to assert that there cannot be such a case as he suggests; but I must say that I cannot at present think of any case in which the payment of dividend out of capital would be justifiable except in the case of the memorandum of association providing that such a payment may be made. If any memorandum of association is ever drawn in that shape it will be time enough to consider how far that enables the company to do it.

Mr. *Macnaghten* has pointed out with great force that there is considerable difficulty in supposing the present case to fall under the class of cases which deal with reduction of capital. Reduction of capital may, and probably does, mean reduction of nominal capital, and in the *Dronfield Silkstone Coal Company's Case* (1) the expression seems to have been so construed. But in this case the proposed proceeding is objectionable, not on the ground that it is a reduction of capital, but that it is a withdrawal of capital from the objects for which the company was incorporated, and if it might be done in this case it would be difficult to point out a case in which a company might not do it.

That being my view of the law, let me consider what these articles propose to do. They propose to take a portion of the capital paid up in respect of the B shares and to apply it to the payment of dividend on the A shares. I think Mr. *Macnaghten* falls into a fallacy when he supposes that the question which we have to decide is whether this application of the B capital is an object of the company which has been omitted from the memo-

(1) 17 Ch. D. 76.

randum of association. It may be that this application of the capital of the B shares is not such an object of the company as could be stated conveniently in the memorandum of association, but that does not seem to me to get rid of the difficulty. The question is not whether this application of the fund is an object of the company which ought to be stated in the memorandum, but rather whether it is not a misapplication of the capital of the company to something which is not an object stated in the memorandum, which is altogether a different question. How can this possibly be said to be an application of the capital to any of the objects of the company stated in the memorandum? The real object is by means of this expenditure of the B capital to give advantages to the A shares which will make them be readily taken by the public.

Nothing that I am saying is to be construed as involving the slightest censure on the gentlemen who conduct the business of this company, or as throwing the least doubt upon the good faith and honour with which they have acted from first to last; but I hold that the application of the B capital provided for by the articles is not an application of capital to carrying on the business of the company, but is providing an inducement to people to take shares and subscribe capital to carry on the business.

But if this is not a direct application of the money to the objects of the company, is it an application of the money to what is incidental or conducive to attaining those objects? Mr. *Macnaghten* has put the case of advertisements. That seems to me to be wholly different. Every company which proposes to obtain subscribers for its capital advertises. If advertisements are issued in the ordinary way of the business of a company, it seems to me they are incidental to carrying out the objects of the company, but there is a limit to the powers of the directors to spend the money of the company in attracting shareholders. Suppose one were to disengage one's self from the atmosphere of respectability and honour in which this company lives and moves, and to take the case, not of the *Land Corporation of Ireland, Limited*, but of some silver mine in a distant part of the world which is put forward with a flourish of trumpets, but the silver in which exists probably only in the imagination of enthusiasts, what would the

C. A.
1882
GUINNESS
v.
LAND
CORPORATION
OF IRELAND.
Bowen, L.J.

public have a right to say, if, although they found in the memorandum of association no provision for applying capital derived from one portion of the shares to payment of dividend upon the other portion, nevertheless in the articles of association such a supplementary provision had been introduced? I think that we could not hold the present Appellants entitled to do what they seek to do without enabling almost every company managed by dishonest promoters from driving a coach and four through the *Companies Act*.

I deeply regret having to come to this conclusion, because these gentlemen are managing an honourable business and wish to manage it in their own way, but in my opinion the Act of Parliament clearly prohibits the proposed application of the B capital.

Solicitors: *Young, Jones, Roberts, & Hale; Freshfields & Williams.*

H. C. J.

C. A.
1882
C. J. B.
Nov. 6, 13, 20.
C. A.
Dec. 7.

Ex parte ISHERWOOD. *In re* KNIGHT.

Leasehold Interest of Bankrupt—Disclaimer by Trustee—Leave of Court—Power to impose Terms—Mortgage—Attornment Clause—Mortgage to Building Society—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *r.* 28.

On giving leave, under rule 28 of the Bankruptcy Rules, 1871, to the trustee in a bankruptcy to disclaim a leasehold interest of the bankrupt, the Court will not order the trustee to pay the landlord any compensation for his use and occupation of the demised property, except under special circumstances, one instance being where the trustee's occupation has been beneficial to the bankrupt's estate.

Rule 28 does not mean that in every case in which leave to disclaim a lease is given, the lessor is to be placed in the same position as regards the interval before execution of the disclaimer as if there had been no disclaimer.

Ex parte Ladbury (1) explained and distinguished.

Notwithstanding the insertion of an attornment clause in a mortgage deed, the real relation between the parties is that, not of landlord and tenant, but of mortgagee and mortgagor, and this fact, as well as the nature of the rent reserved by the clause, must be taken into account in

(1) 17 Ch. D. 532.

considering whether, on giving leave to the trustee in the bankruptcy of the mortgagor to disclaim the tenancy created by the attornment clause, any terms should be imposed for the benefit of the mortgagee.

ON the 3rd of August, 1875, *John Knight*, a manure manufacturer, executed to the trustees of the *West Derby and Everton Perpetual Benefit Building Society* a mortgage of his freehold manufactory and fixed machinery, and of his stock-in-trade, and other personal chattels, to secure the repayment to the society of an advance of £7500, which, according to the rules of the society, was to be repaid, with interest, in a series of monthly instalments of £71 17*s.* 6*d.* each. If the monthly payments were not punctually made certain fines were to be incurred, and these fines were also secured by the mortgage. In case the mortgagor should be in default in making his monthly payments for three months, power was given to the mortgagees to enter into possession or receipt of the rents of the mortgaged property. And it was agreed that, if the mortgagees should at any time become entitled to enter into possession or receipt of the rents of the mortgaged property, and the mortgagor should then or afterwards be in occupation thereof, he should during his occupation be tenant thereof from month to month to the mortgagees, at a monthly rent of such a sum as should be equal in amount to the moneys which ought to be paid monthly by him under the rules, the rent being due monthly in advance. And it was provided that it should be lawful for the mortgagees, after giving fourteen days' previous notice of their intention so to do, to enter upon and take possession of the mortgaged premises, and to determine the tenancy. The provisions of the deed, and the attornment clause, are more fully stated in the report of *Ex parte Voisey* (1). The deed was not registered under the *Bills of Sale Act.*

On the 12th of October, 1881, *Knight* signed a memorandum by which he further charged the property with the payments to become due to the society in respect of a further advance of £1600 which they had made to him.

On the 2nd of December, 1881, *Knight* having been in default for three months in making his monthly payments, and he being in occupation of the mortgaged property, the society levied a

(1) 21 Ch. D. 442.

C. A. 1882 *Ex parte* ISHERWOOD. *In re* KNIGHT.

distress thereon for £664, the whole amount then due from him to the society. On the 5th of December, 1881, *Knight* was adjudicated a bankrupt in the *Liverpool* County Court, upon a petition which had been presented on the 2nd of December, founded on an act of bankruptcy committed by him on the 26th of November. On the 21st of December two trustees of his estate were appointed, and they entered into possession of the mortgaged property. On the 11th of January, 1882, the building society levied another distress on the mortgaged property for £255 15*s.* 5*d.*, the further amount which had then become due from *Knight* to them. On the 14th of January an agreement was entered into between the trustees of the society and the trustees in the bankruptcy, which provided that the stock-in-trade which had been seized by the trustees of the society under their distresses should be sold under the directions of the two sets of trustees, without prejudice to the rights of any of the parties, and that the net proceeds of the sale should be paid into a bank, in the joint names of both sets of trustees. The trustees in the bankruptcy were, within fourteen days after the money should have been paid into the bank, to give up all claim to the same, or to take steps, and prosecute the same with all due diligence, to establish their claim. In the event of their not making a claim within the fourteen days, they were to do all things in their power to facilitate the payment out of the money to the trustees of the society. There was a further provision that "Nothing herein contained, nor any delay which has taken or will take place shall in any way prejudice the trustees of the building society." After this the stock-in-trade was sold, the proceeds of sale, amounting to £1774, were paid into the bank in the joint names. On the 9th of February the society levied a third distress for £127 10*s.* 4*d.*, the further amount then due to them by *Knight*. On the 10th of March the trustees in the bankruptcy applied to the County Court for an order declaring the attornment clause, and the distresses levied under it, void as against them, and on the 21st of March the Judge made an order to that effect. The building society appealed to the Chief Judge, and he, on the 8th of May, reversed the decision of the County Court Judge, and held the distresses valid, and on the 20th of July this decision was affirmed by the Court of

Appeal: *Ex parte Voisey* (1). On the 15th of May the society had levied a fourth distress for £375 17*s.* 6*d.*, the further amount which had then become due to them from *Knight*. On the 18th of May another agreement was entered into between the trustees in the bankruptcy and the trustees of the society, which provided that the loose effects at the bankrupt's works, which had been advertised for sale by the trustees in the bankruptcy, and had been distrained upon by the society, should be sold by the bankrupt's trustees, and that the proceeds of sale should be paid into the bank in the joint names, as provided by the former agreement, "and that the moneys now and hereafter to be in the said bank shall be applied in payment of the distresses issued by the building society . . . . so far as such distresses are not held void, and that the men in possession under the building society's distress shall withdraw from possession. Provided always that nothing contained in this agreement shall prevent the bankrupt's trustees contesting the validity of the last distress, if they shall be so advised."

After this the loose effects were sold, and the proceeds of the sale were paid into the bank in the joint names.

On the 16th of August, 1882, the trustees in the bankruptcy gave notice of an application to the County Court, to be made on the 25th of August, for an order giving them leave to disclaim the tenancy created by the attornment clause, upon such terms as to the Court might seem just. This application was heard by the Judge on the 25th of August. The building society contended that, as a condition of obtaining leave to disclaim, the trustees in the bankruptcy ought to be ordered to pay to the society all the monthly payments of rent (including fines) which had accrued due under the terms of the mortgage deed from the date of the adjudication down to the date of the disclaimer. The Judge gave leave to disclaim on the terms which were expressed in the following declaration contained in the order, which was drawn up and dated the 13th October, 1882. "It is declared that the trustees of the society are entitled to be paid the sum of £664 (being the amount of the monthly rent under the attornment clause distrained for on the 2nd of December, 1881), and are also entitled to be paid as and for the

(1) 21 Ch. D. 442.

C. A. 1882 *Ex parte* ISHERWOOD. *In re* KNIGHT.

monthly rent under the attornment clause the sum of £87 4*s.* 2*d.* per month (being the amount of the monthly subscriptions payable to the society by the bankrupt under the provisions of the mortgage and the further charge) commencing from the last rent comprised in the distress made on the 2nd of December, 1881, and ending on the 25th of August, 1882 (the rent current on the last mentioned day to be apportioned to that day) together with the fines payable by the rules of the society, such fines to run until the proceeds of the sales held in pursuance of the agreements of the 14th of January and the 18th of May, 1882, were from time to time paid into the bank." And it was ordered that the account of the monthly rent should be taken by the Registrar of the Court, who should certify the amount payable to the trustees of the society, and that the Registrar should also tax and allow the costs of the trustees of the society of and incident to the distresses. And it was ordered that the amounts so certified to be payable to the trustees of the society, and allowed them for costs of the distresses, should be paid to the trustees of the society out of the moneys paid into the bank under the two agreements. And it was further ordered that, if those moneys should be insufficient to satisfy the payments thereinbefore directed, the deficiency should be paid by the trustees of the bankrupt out of the estate of the bankrupt, and that, if the moneys paid into the bank should be more than sufficient, the surplus should be paid out to the trustees of the bankrupt as part of his estate. The Registrar afterwards certified that the amount payable to the society for monthly rent under the terms of the order was £1581 2*s.* 3*d.* The total amount of the four distresses was £1423 3*s.* 3*d.*

The trustees in the bankruptcy had continued in possession of the mortgaged property until the 10th of July, 1882, but it did not appear that their occupation had been a beneficial one for the estate of the bankrupt.

The building society considered that they should have been allowed the fines payable under the society's rules, not merely until the dates of the payments into the bank in the joint names, but until the date of actual payment to the society, and also that the monthly rent should be paid to the society down to the date

of the actual execution of the disclaimer by the trustees of the bankrupt.

The trustees of the building society appealed to the Chief Judge.

The appeal was heard on November 6, 13, 20, 1882.

Horton Smith, Q.C., and *J. E. Linklater*, for the Appellants.

Winslow, Q.C., and *Mulholland*, for the Respondents.

BACON, C.J., affirmed the decision of the County Court Judge.

The building society appealed to the Court of Appeal. C. A.
The appeal was heard on the 7th of December, 1882.

Horton Smith, Q.C., and *J. E. Linklater*, for the Appellants:—

The bankrupt's trustees ought to pay all the rent which became due under the attornment clause between the date of their appointment and the date of the execution of the disclaimer. The trustee is personally liable as from the date of his appointment on the covenants in a lease of the bankrupt unless he disclaims: *Titterton* v. *Cooper* (1).

[JESSEL, M.R.:—The disclaimer relates back to the date of the adjudication. Why should you have a preference over the bankrupt's other creditors? It does not appear that the occupation of the trustees was beneficial to the bankrupt's estate.]

Rule 28 of the *Bankruptcy Rules*, 1871, enables the Court to do justice by imposing terms on a trustee when it gives him leave to disclaim a lease, and in *Ex parte Ladbury* (2), the Court ordered a trustee to pay the rent up to the date of his disclaimer.

[JESSEL, M.R.:—In that case the Court declined to interfere with the exercise of the Registrar's discretion. Moreover, there the lessor had been kept out of possession; here you chose to remain out of possession.]

The fact that the trustees did not apply for leave to disclaim till so long after the adjudication is an element to be taken into

(1) 9 Q. B. D. 473. (2) 17 Ch. D. 532.

C. A. 1882

Ex parte ISHERWOOD. *In re* KNIGHT.

account in the exercise of the discretion of the Court under rule 28. It has never yet been laid down that the Court will impose terms on the trustee only when it is shewn that the bankrupt's estate has derived a benefit by the occupation of the property. If the trustee does not apply for leave to disclaim as soon as possible, he ought to pay the landlord what the bankrupt would have had to pay if he had remained in occupation. The disclaimer will relieve the trustee from all future liability. If the rule were laid down thus, the difficulty arising out of a conflict of evidence on the question whether the trustee's occupation has been beneficial to the bankrupt's estate would be avoided. If in the present case it was held that the trustees had a simple right to disclaim, this would amount to overruling the previous decision in *Ex parte Voisey* (1) that the distresses were valid.

Winslow, Q.C., and *Birrell*, for the bankrupt's trustees, were not heard.

JESSEL, M.R.:—

Whether the present Appellants have or have not got more than they are entitled to I will not say; I am quite satisfied of this, that they have got at least as much as they are entitled to, and that is all which it is necessary for us to decide. Whether this 28th rule is or is not *ultrà vires* it is not necessary to decide on the present occasion; the Court carefully abstained from deciding it in *Ex parte Ladbury* (2). If the rule amounted to an absolute prohibition to the trustee to avail himself of the provisions of the Act, of course a great deal might be said as to its being *ultrà vires*. But, when the trustee himself is applying to the Court under the rule, he cannot be heard to complain of it. On the present occasion the Appellants do not complain of the rule; on the contrary, they ask us to construe it and to give effect to it. But, if the rule is not *ultrà vires*, it cannot mean this, that in every case a disclaimer shall not be executed or take effect unless the landlord is put in the same position up to the date of its execution as if no disclaimer had been executed, because the Act says the disclaimer shall relate back to the date of the

(1) 21 Ch. D. 442. (2) 17 Ch. D. 532.

adjudication. Therefore it comes to this, that if the rule applies at all, it enables the Court to impose terms on the trustee only when a special case is made out. In *Ex parte Ladbury* (1) a special case was made out, though I do not know the exact extent of it. It appears from the report of that case in the *Law Times* (2), in which the facts are more fully stated than in the *Law Reports*, that the trustee had kept possession of the demised property, which was supposed to be of some value over and above an equitable mortgage upon it, that he had sold the equity of redemption, that the purchaser was unable to complete his contract and had forfeited part of his deposit in order to be let off his bargain, and the sum so forfeited had, of course, gone to increase the bankrupt's estate. It also appears that the landlord had been kept out of possession, how I do not know. Whether there was no proviso for re-entry, or any clause in the lease to hinder the re-entry, does not appear. That being so, it was held, not that the landlord was entitled to his rent up to the date of the disclaimer, but that he was entitled to some compensation for the trustee's use and occupation of the property during the time for which he was kept out of the estate, and in the opinion of the Court of Appeal the compensation which had been awarded him by the Registrar was not too much. That is all which was decided in *Ex parte Ladbury*.

Well, if that is so, we are only following *Ex parte Ladbury* in saying that the landlord must make out some special case. I do not mean to limit it to such a case as *Ex parte Ladbury*, that is, to a case where the trustee has got a pecuniary benefit for the bankrupt's estate by keeping possession of the demised property; there may be other cases, and I wish, so far as I can, not to fetter the Appeal Court by laying down any definite limit as to the nature of the cases in which terms ought to be imposed on the trustee; but that there must be something special I am quite clear.

That being so, what have we here? In the first place, the relation between the parties is not the ordinary one of landlord and tenant, but it is the ordinary relation of mortgagee and mortgagor. The nature of that relation is well known. In equity the mortgagor was the owner of the estate, and the mortgagee was

(1) 17 Ch. D. 532. (2) 45 L. T. (N.S.) 5.

C. A. 1882 *Ex parte* ISHERWOOD. *In re* KNIGHT. Jessel, M.R.

only entitled to a charge upon it (I am speaking roughly); at law the mortgagee was the legal owner of the estate (I am now speaking of freehold estates), and the mortgagor was what was called "tenant at will," a very peculiar kind of tenancy. That was the legal relationship between the parties. The relation in equity was totally different. In an ordinary case, there being no rent reserved, the tenant at will did not pay any rent, and was not liable to pay any, but you might superadd to that legal relationship an express agreement for a tenancy, as was done in the present case, in which a monthly tenancy was created at a monthly rent. That, no doubt, altered the legal relation between the parties, but it did not alter the equitable relation. The rent, if paid, was in equity paid on account of principal and interest; if it exceeded the interest it would go in reduction of the principal. It was the subject-matter of account between the mortgagee and the mortgagor. Therefore, in equity the mortgagee remained only a chargee, and the mortgagor remained the owner of the estate, notwithstanding this variation in the ordinary legal relation between them. That is the true position of the parties. That being so, we have in this case a reservation to the mortgagees of a right to take possession after fourteen days' notice, because, having created the monthly tenancy, they did not wish to be kept out of possession a whole month, and it was provided that they might after fourteen days' notice take possession. When the mortgagee took possession there was a change in the relation of the parties in equity as well as at law. At law the mortgagee became the owner in possession, and in equity he became mortgagee in possession, entitled to certain rights as regards possession, and subject to certain liabilities.

That being the position of the parties, the mortgagor in the present case becomes bankrupt. Then the mortgagees say, "We claim our rent." Now, in this particular case we must look at what the rent really was, because here again there is a great distinction between the ordinary case of landlord and tenant, when the rent is that which is agreed upon between the parties as the sum of money fairly payable for the occupation of the demised property, and what I will call a fancy rent, that is, a rent fixed, not with regard to what the tenant can afford to pay,

or ought to pay, for the occupation of the property, but with regard to the amount of the interest on the mortgage debt, or, as in the present case, the mortgagees being a building society, for the interest and fines. In an ordinary mortgage where the rent fixed by the attornment clause really represents the interest on the mortgage debt, it may not be a tenth of the annual value of the property. But here, if the mortgagor was in default and the fines were added, it would be much more. Indeed, from the report of the case when it was before this Court on the previous occasion (*Ex parte Voisey* (1)), it seems that the rent in that event would certainly amount to the full value of the property, and perhaps to something more, though not so much more as to lead the Court to think that it was not intended to be a *bonâ fide* rent. It is plain, therefore, that if the rent is more than the value of the property, and it is fixed, not with regard to that value, but with regard to other circumstances, viz., in order to secure by distress the due payment of interest and fines, the keeping of the mortgagee out of possession does not inflict upon him an injury equivalent to the amount of the rent reserved.

Moreover, in the present case the mortgagees were not kept out of possession; they could have entered at any time after fourteen days' notice. The remaining out of possession was a voluntary abstention on their part, because they thought it would be for their advantage to distrain for a sum larger than they could obtain by letting the property to a tenant. Whether, therefore, you consider the real relation between the parties, which was not the ordinary one of landlord and tenant, or the circumstance that the mortgagees might have taken possession at any moment after fourteen days' notice, it does not appear to me that they have suffered any special injury. On the contrary, by the terms of the order of the County Court, they appear to have obtained a very considerable benefit by being allowed to distrain after the bankruptcy on the goods of the bankrupt for the amount reserved to them as rent. That being so, I can see no reason whatever for imposing upon the trustee any terms beyond those imposed by the order, which in substance amounted to this, that the trustees are to pay all the rent for which the distresses were levied, and some-

(1) 21 Ch. D. 442.

C. A. 1882

Ex parte ISHERWOOD.

In re KNIGHT.

thing more. Under the circumstances I think the Appellants are not entitled to complain of the order, and the appeal must be dismissed.

COTTON, L.J.:—

I am of the same opinion. The complaint made by the Appellants is this, that, under the power given to the Court by rule 28, to impose terms on the trustee in a bankruptcy, when he applies for leave to disclaim a lease of the bankrupt, the Court ought to have given the Appellants more than they have got under the present order. Now the argument was carried to a very great length, and I should hardly have thought it necessary to deal with the case, but for the fact that it was contended, that, when there is an application for leave to disclaim, the trustee ought in fact to be put under the terms of paying the whole of the rent reserved by the lease which he disclaims up to the date of the execution of the disclaimer. That would be entirely contrary to the provisions of the Act. The Act, by throwing back the effect of the disclaimer to the date of the adjudication, relieves the trustee, as from the date of the adjudication, from the consequences of the lease having vested in him. To say that in every case when a trustee applies for leave to disclaim a lease, he should be put on the terms of paying the rent, as if the disclaimer took effect only from the date of its execution, would be to repeal the Act. In certain cases the Court has, and in my opinion rightly, put the trustee so coming for leave to disclaim under terms. When the lease vests in him as trustee he becomes personally liable for the rent, with a right to go against the bankrupt's estate for indemnity. When he has disclaimed the lease then it has been held that the landlord's rights under the lease as against the trustee of the estate of the bankrupt are gone, and that he cannot sue the trustee for the use and occupation of the property. It has been held that the trustee cannot be sued as a trespasser, and under special circumstances it is, in my opinion, right that he should be put under the terms of making some payment to the landlord, when he comes to ask for leave to deprive the landlord, as from the date of the adjudication, of the legal rights given to him by the lease, which is to

be disclaimed or put an end to as from that date, the landlord having, except under rule 28, and by means of the right to prove given to him by sect. 23, no remedy in respect of the trustee's use and occupation of the property, nor any right to treat the trustee as a trespasser.

I think it is not necessary that we should in any way narrow the circumstances under which the Court may impose terms on the trustee, beyond saying that there must be special circumstances. The Master of the Rolls has already said that he does not intend to restrict the power to cases like *Ex parte Ladbury* (1), in which terms were properly imposed, because the trustee had made a profit by the property. In any case, what the trustee will have to pay is not the profit which he has made, or the rent according to the lease. But, in determining what he ought to pay, regard must be had to two things, whether the occupation has either in fact produced a benefit to the bankrupt's estate, or was contemplated as likely to produce a benefit, and the circumstance that, in consequence of the disclaimer relating back to the date of the adjudication, the owner of the estate is in the interval between the adjudication and the execution of the disclaimer in this position, that he has been lawfully kept out of the use of his property by virtue of the operation of the lease, and cannot after the disclaimer bring any action against the person who without his consent has been in the occupation of the property. These two things ought to be taken into consideration.

But, taking the present case simply as one of landlord and tenant, I cannot see that any special case has been made out by the Appellants to shew that the sums which have been allowed them for the rent reserved under the attornment clause are not amply sufficient, even if the property was treated as theirs from the date of the adjudication, to compensate them for their property having been in the occupation of persons against whom they can make no claim, except by means of the power given to the Court by the 28th rule. There, in my opinion, is the entire foundation for imposing any terms on the trustee, or for the landlord's claim to have any payment made to him. I do not suggest that it was wrong to give the Appellants what they have got. There was

(1) 17 Ch. D. 532.

C. A. 1882 *Ex parte* ISHERWOOD. *In re* KNIGHT. Cotton, L.J.

the agreement between the parties as to the mode of dealing with the distresses, and certainly at present I do not see that this was done away with by the disclaimer. The whole ground for giving the landlord on such an application a right to receive something from the trustee is that, from the effect of the disclaimer, he, the owner of the property, has been from the date of the adjudication in such a position that, though he has been kept out of his property, and it has been in the possession of another, he has no remedy at law or in equity for the purpose of recovering compensation. But in the present case the position of the parties was this, not that the Appellants were by the effect of the disclaimer as from the date of the adjudication the owners of property of which they were not in occupation, but that the trustees, as the owners of the equity of redemption, were in possession of their own property, and, therefore, it cannot be said that leave to disclaim ought not to be given or that any terms should be imposed upon the trustees. The grounds on which terms are imposed are that since the date from which the disclaimer takes effect the possession has been contrary to the title. Here the possession has been in accordance with the title. I cannot see how the Appellants, the mortgagees, who have not been kept out of their property, because they might have taken possession when they pleased, can say that the Court ought to give them, in addition to what has been already given, any compensation in order to justify the trustees in getting that relief which they ask.

BOWEN, L.J.:—

I entertain a very clear opinion to the same effect, but I do not wish to add anything to what has been already said. It seems to me that the law could not be stated more clearly than it has been by the Master of the Rolls and Lord Justice *Cotton*.

Solicitors for Building Society: *H. B. Priest*, agent for *J. P. Harris & Gorst, Liverpool.*

Solicitors for Trustees: *Paterson, Snow, & Bloxam*, agents for *Brook & Morris, Liverpool.*

W. L. C.

McHENRY *v.* LEWIS.

C. A.
1882
Dec. 9.

[1881 N. 2327.]

Practice—Staying Proceedings—Two Actions in this Country—Action in Foreign Country—Lis alibi pendens.

When a Plaintiff sues a Defendant for the same matter in two Courts in this country, such a proceeding is *primâ facie* vexatious, and the Court will generally, as of course, put the Plaintiff to his election and stay one of the suits. And the same principle applies where one of the actions is in the Queen's Courts in *Scotland* or *Ireland*, or any other part of the Queen's dominions. Under the present practice *Lord Dillon* v. *Alvares* (1) cannot be relied on as an authority.

But if one of the actions is in a foreign country where there are different forms of procedure and different remedies, there is no presumption that the multiplicity of actions is vexatious, and a special case must be made out to induce the Court to interfere. The Court has, however, power to interfere in such a case under its general jurisdiction to restrain vexatious and oppressive legislation, and will interfere in a proper case even before decree.

And *semble*, after a decree has been made in one of the actions, the Court will be more willing to exercise its jurisdiction.

Cox v. *Mitchell* (2) considered.

THIS was an appeal from a decision of Mr. Justice *Chitty* (3) refusing an application by the Defendants to stay all proceedings in the action.

The action was commenced in July, 1881, by *McHenry* on behalf of himself and all other holders of certificates of bonds and shares under a scheme for the reorganisation of an American company called the *Atlantic and Great Western Railroad Company* against the Defendants, who were trustees of the scheme, seeking to make them liable for certain alleged breaches of trust with reference to the scheme.

In the year 1879 an action had been brought in *England* by a Mr. *Conybeare* against the same trustees, the object of which was to a certain extent identical with *McHenry's* action; but *McHenry's* action was wider and more comprehensive, and was founded on rights which, as he alleged, could not be enforced in *Conybeare's* action.

(1) 4 Ves. 357.
(2) 7 C. B. (N.S.) 55.
(3) 21 Ch. D. 202.

C. A. 1882 McHENRY v. LEWIS.

In August, 1881, after *McHenry's* action had been commenced, an action was brought in *America* by another Mr. *Conybeare* and *McHenry*, as co-Plaintiffs, on behalf of themselves and the other holders of certificates, for purposes which were substantially the same as those sought in *McHenry's* English action; but there were in the American action additional Defendants, namely, the new company which had been established in *America* in pursuance of the reconstruction scheme, and the new directors.

No judgment had been obtained in either of the three actions; but an order had been made in *Conybeare's* English action to ascertain the amount of remuneration which ought to be paid to the trustees.

The Defendants sought in the present motion to restrain the proceedings in the action of *McHenry* v. *Lewis* during the pendency of the other two actions. The motion was made in the first instance before Mr. Justice *Kay*, during the absence of Mr. Justice *Chitty* on circuit, who ordered it to stand over for the purpose of giving the Defendants the opportunity of serving *Conybeare*, the Plaintiff in the English action, and moving to consolidate the actions. The Defendants, however, did not take this course, and renewed the motion before Mr. Justice *Chitty*, who dismissed the application, making the costs costs in the cause.

The Defendants appealed from that decision.

Romer, Q.C., and *Hatfield Green*, for the Appellants:—

The object of the motion is to oblige the Plaintiff to elect in which action to proceed. All the actions are substantially for the same object. If they were all in English Courts the application would be a matter of course. Where one of the actions is in a foreign Court the Court has the jurisdiction to stay the English action, but exercises a discretion as to doing so. If the Plaintiff's proceedings are vexatious the Court will interfere, and in the present case they are vexatious. The American action is really *McHenry's* action, the other Plaintiff being merely his nominee. The English action of *Conybeare* v. *Lewis*, although brought by a different Plaintiff, will obtain for *McHenry* all the relief that he is entitled to. The Court never allows a multiplicity

of actions by different shareholders against the officers of a company for the same matters: *Walsh* v. *Bishop of Lincoln* (1); *The Mali Ivo* (2); *The Catterina Chiazzare* (3); *Commissioners of Sewers* v. *Gellatly* (4); *Cox* v. *Mitchell* (5); *Watson* v. *Cave* (No. 1) (6); *Lord Dillon* v. *Alvares* (7); *Ostell* v. *Lepage* (8).

[COTTON, L.J., referred to *Wedderburn* v. *Wedderburn* (9).]

Ince, Q.C., and *H. B. Buckley*, for the Plaintiff, were not called on.

JESSEL, M.R.:—

This is an appeal from a judgment of Mr. Justice *Chitty*, and it raises, to make an observation which I make very often in this Court, a most important question of law. That question is, whether or not when an action is brought by a man in this country against a Defendant and the same Plaintiff brings an action in a foreign country against the same Defendant for the same cause of action this Court has jurisdiction in a proper case to stay the action in this country on the ground that the Defendant is doubly vexed by reason of the action being brought also in the foreign country.

Notwithstanding what has been said about the case of *Cox* v. *Mitchell*, I am of opinion that there is such a jurisdiction in this Court, and that it is part of the general jurisdiction of the Court to prevent a Defendant being improperly vexed by legal procedure. I see no reason on principle why, if the Court is satisfied that the Defendant is being improperly vexed, the mere fact of one of the actions being in this country and one in a foreign country should prevent the Court protecting the Defendant from being so improperly vexed. So much for the general jurisdiction.

Now I am not sure that what I have stated really conflicts with the judgment of the Court of Common Pleas in the case of *Cox* v. *Mitchell*. In one view it does not so conflict. If the true

(1) Law Rep. 4 A. & E. 242.
(2) Ibid. 2 A. & E. 356.
(3) 1 P. D. 368.
(4) 3 Ch. D. 610.
(5) 7 C. B. (N.S.) 55.
(6) 17 Ch. D. 19.
(7) 4 Ves. 357.
(8) 5 De G. & Sm. 95.
(9) 4 My. & Cr. 585.

C. A. 1882 McHENRY v. LEWIS. Jessel, M.R.

view of the judgment is, that *primâ facie*, a man is not doubly vexed when the action is brought in the two countries, but that you want a special case to shew that he is doubly vexed, then there is no conflict of opinion. If, however, it means that in no case can the Court interfere, then I must admit, with the greatest deference to the four learned Judges who decided *Cox* v. *Mitchell* (1), I should not be prepared to indorse their opinion.

As regards the second point, it appears to me that very different considerations arise where both the actions are brought in this country and where one of them is brought in a foreign country. In this country, where the two actions are by the same man in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *primâ facie* vexatious to bring two actions where one will do. And, indeed, this has been recognised, I believe, for ages by the practice of the old Court of Chancery, which always put a Plaintiff to his election by an order of course if he was suing for the same cause of action both at Law and in Equity. The same principle applies, it appears to me, wherever the judgment can be enforced, and for that reason I think that the case of *Lord Dillon* v. *Alvares* (2) can no longer be relied on. At the time when that case was decided a judgment in *Ireland* could not be enforced in *England*, nor could a judgment in *England* be enforced in *Ireland*. That is not so now, and therefore as between *England* and *Ireland*—and the same observation applies to *Scotland*—you have the Queen's Courts, which, although not identical, are very similar in procedure, and you can obtain the same remedies. Therefore, it appears to me that in all those cases there is *primâ facie* vexation. It is possible that the same observation might be made as regards the Queen's Courts in any other part of the world, but that of course may be subject to exception as regards the nature of the remedy. But where it is in a foreign country it certainly appears to me that we cannot draw the same inference. Not only is the procedure different, but the remedy is different. Take the case of an Englishman suing abroad a foreigner resident abroad, and the foreigner coming to this country, as in *Cox* v. *Mitchell*, the Plaintiff might have totally different remedies. At that time he had

(1) 7 C. B. (N.S.) 55. (2) 4 Ves. 357.

225

the remedy of writ of *capias* in *England*, and, as far as I know, that had been abolished in several of the States of *America*, and perhaps in *South Carolina*, at that time. That was a different remedy. But there is more than that. He might have a personal remedy in one country and a remedy only against the goods in another. He may have a remedy against the real estate in one country and no such remedy against the real estate in the other. It is not so very long ago since the law of *England* did not allow a creditor to take a dead man's real estate, and we know that in foreign countries various laws apply, as regards the remedies, of a totally distinct character from the laws regulating the remedies in this country, so that it is by no means to be assumed in the absence of evidence that the mere fact of suing in a foreign country as well as in this country is vexatious. It seems to me that you must make out a special case, and there is therefore that distinction between the case of the two actions being brought in the Queen's Courts, and one action being brought in the Queen's Court and the other in the Court of a foreign sovereign.

Well, that being so, we must consider in this case whether a special case for vexation has been made out. Now here there are three actions, and I can well understand that the Defendants who make this application strongly object to having the same subject-matter litigated three times over. In the first instance, there is an action brought by a gentleman of the name of *Conybeare* to make Mr. *Lewis* and his co-trustees liable for certain alleged breaches of trust. I need not go into that, the matter is still *sub judice*, and of course, if the actions proceed, will be disposed of at the trial. The first action, I may say, is by Mr. *Conybeare* on behalf of himself and all the other shareholders in a railway, the *Atlantic and Great Western Railroad Company*. The second action is by Mr. *McHenry*, who, also on behalf of himself and all the other shareholders of the *Atlantic and Great Western Railroad Company*, seeks amongst other things to make the Defendants liable for the same breaches of trust. But the second action is wider, it not only seeks to make them liable for those breaches of trust, but it extends to other relief for other alleged breaches of trust, partly against them and partly against other people, and it

C. A. 1882 McHENRY v. LEWIS. Jessel, M.R.

also joins certain personal individual claims of Mr. *McHenry* independently of the other shareholders. That is the nature of the second action. Then the third action is an action by the same Mr. *McHenry*. I have not forgotten that another Mr. *Conybeare* is nominally joined with him, but from the statements made at the Bar—I have not heard the other side, but I will assume that they are substantially correct—it is *McHenry's* action which is brought in the *United States*, and it is brought against the same Defendants who are Defendants to the English action. It is brought substantially for the same purposes as the English action of Mr. *McHenry* as regards the company; but there are in addition to the Defendants to the English action the new *American Railroad Company* and the directors of the *American Railroad Company* who are not parties to the English action. Therefore this American action differs from *McHenry's* English action in the fact of additional parties, and very important parties too.

Now, in order to try the *bona fides* of *McHenry's* first action you must see what it is for, and it is not suggested by the present Appellants that one action, at all events, does not raise a substantial question which is proper to be raised and proper to be tried. Therefore it is not a case of a frivolous action in any sense of the word, nor of a vexatious action. The vexation, if any, consists in bringing several proceedings to try the same question or series of questions. There is a substantial question and a serious question to be tried. A motion was made in *McHenry's* action in *England*, for an injunction, which failed because the *American Railroad Company* and the directors of that company were not parties to it, and thereupon, or soon afterwards, the American action was instituted making them parties. That seems to me to be the strongest evidence to shew that the American action was brought because the English action had failed to that extent, and it does seem to me very good evidence that the second action was brought in good faith.

Now what will happen as regards the second action? We have got these parties to the litigation who could not be made liable in *England*, and who could be made liable in *America*, and we have got this also, that the parties to the action in *America*

who are resident in *England* can be made liable in *England* and cannot be made liable in *America;* for although you may get judgment against them in *America*, you cannot enforce that judgment in *England*, you must bring an action upon it. So strongly was that felt by the moving parties that they actually offered a personal undertaking to allow judgment to be entered up against them in *England*, if judgment is obtained in the American action, shewing that the difficulty was present to their minds. Therefore no special case is made out for stopping the American or the English actions, but on the contrary there is a special case for two actions; because you can only enforce the claim of the Plaintiffs directly by getting judgment in both countries.

At the same time I cannot help thinking that if I could see my way to have the question which is the main question in dispute litigated once for all, I would do so. But then it will be, I suppose, decided in one action before it will be decided in the other. It will not be decided at the same moment, and it does seem to me that when judgment is pronounced in one action some application may be made which will prevent the other action proceeding. To some extent, therefore, though not to the entire extent, you can save expense. But there is another thing which has been pressing upon my mind, I do not know the state of the cause lists in the *United States*, though I know something about the state of them here; and it may well be that it may be eminently desirable to let both actions go on with a view of getting a speedy trial. It is no doubt to a certain extent a hardship on the Defendants, and to a certain extent a hardship on the Plaintiff who is bringing two actions; but I cannot at present say that there is any special case made out in this instance for the interference of the Court, and as far as I can see there is very strong ground for saying that the actions are not only brought *bonâ fide*, but with a decided intention to enforce the remedy to which the Plaintiff believes himself entitled. On the whole it seems to me that we ought not to interfere by staying the English actions.

Now I have some remarks to make on the third action. This third action, as commenced first by Mr. *Conybeare* on behalf of himself and the other shareholders, is complained of as being vexatious, together with *McHenry's* English action. As I said

C. A. 1882

McHENRY v. LEWIS.

Jessel, M.R

before, the two actions do not quite cover the same ground. I am not now saying that if notice of motion for consolidation had been given both to *McHenry* and to *Conybeare*, something might not have been done; but it was objected in the Court below, and properly objected, that no notice of this motion had been given to *Conybeare*, and that until that was done the Court was not empowered to deal with the action. I quite agree that you ought not to allow a company, or directors of a company, to be sued by a multitude of shareholders in a multitude of separate actions, each of which is instituted on behalf of all the shareholders. You might have a hundred actions brought upon the same act or alleged breach of trust, and therefore of course the Court has power to stop all but one of the actions if they are all for exactly the same thing. But the course of the Court is well settled. The defendants take out a summons to stay the actions which have been previously transferred of course to the same Judge or Court, and then the Court decides which of the actions is to go on as a test action, and which are to be stayed. You cannot tell until you have all the plaintiffs before you the right course to be taken. The first action may be a collusive action, one action may embrace further relief than another, one action may be better framed than another to raise the questions in dispute, one action may be more perfect as to parties than another, in one action the plaintiff may be a solvent person, and able to answer costs, and in the other the plaintiff may be a pauper. Various considerations may arise, and until you get the whole of the actions before the Court the Court cannot decide which is to be allowed to proceed, or on what terms. It sometimes happens that we allow one action to proceed for one purpose and another for another purpose—that is that we excise from one action so much of the relief as can properly be attributed to an earlier plaintiff, and allow the second or third action to go on for the additional relief; but all that can only be discussed in the presence of all parties. Now this objection was taken in the Court below, and the present applicants did not ask to amend their notice of motion to bring the Plaintiff *Conybeare* in *Conybeare* v. *Lewis* before the Court, and they have chosen to appeal without making him a party. It appears to me that that is a

fatal objection to so much of the motion as relates to the prosecution of *McHenry's* action, so far as it extends to the same objects as are covered by Mr. *Conybeare's* English action.

Therefore, in my opinion, the decision of the learned Judge in the Court below was right on both points, and I think this application fails and must be dismissed.

COTTON, L.J. :—

The Appellants here seek to stay an action in *England* on the ground that there is another action by the same Plaintiff jointly with another in the *United States of America*. Now I am of opinion that the appeal fails, but not on the ground that this Court has no jurisdiction to make the order if a state of circumstances was shewn to exist proper for the exercise of that jurisdiction. It is true that *Cox* v. *Mitchell* (1) was relied on in the Court below as deciding a principle which prevented the Court from making the order in the present case, and when one merely sees the report of the case it looks as if that were so. But I cannot accede to that case if it lays down as a general principle that this Court cannot interfere where one of the actions is in *England* and the other in a foreign Court. I find that Lord *Cottenham* in *Wedderburn* v. *Wedderburn* (2) lays down the rule with reference to suits in *England* and abroad in these terms: "There can be no doubt that the general rule precludes parties from proceeding in any other Court for the same purpose for which they are proceeding in this Court, whether the other proceedings are taken in this or in any other country;" and, again, Lord *Cranworth*, in *Carron Iron Company* v. *Maclaren* (3), says: "Where, therefore, pending a litigation here in which complete relief may be had, a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party, and restrains the foreign proceedings." He then refers to cases where all that would be done would be, not election, but restraining the foreign proceedings. He refers to cases where there has been a judgment in the English action under which the parties suing abroad can obtain perfect relief, and therefore he

(1) 7 C. B. (N.S.) 55. (2) 4 My. & Cr. 596.
(3) 5 H. L. C. 416, 437.

C. A. 1882 McHENRY v. LEWIS. Cotton, L.J.

does not put it as a question of election; but in my opinion the power of the Court to interfere is not restricted to cases where there has been a decree in one of the actions, but exists (on the principle that there shall not be double vexation by the same party with reference to the same matter) where that occurs, though one of the proceedings is abroad and the other is in this country. That being my opinion, I quite agree with the Master of the Rolls in his opinion that we cannot accept *Cox* v. *Mitchell* (1) as deciding that this Court has no jurisdiction, simply because one of the actions is in a foreign tribunal, to interfere and put the party suing in both tribunals to his election, or to restrain one of the actions. Possibly what the Judges in *Cox* v. *Mitchell* may have meant to decide was this, that where both the actions are in *England*, in the Queen's Courts in *England*, or under the present law in *Scotland* or *Ireland*, it would be a matter of course to stay one of them, merely from the fact that there is the litigation between the same parties about the same matter, but that where one of the actions is abroad then it is not of course but it is a matter of discretion, having regard to the circumstances of the case, whether the Court, having jurisdiction, is willing to interfere.

The distinction between proceedings where they are both in the same tribunal, and when one is in *England* and the other is abroad, has already been pointed out by the Master of the Rolls, and that may explain why it is of course when both the actions are in *England*, and not of course when one is in *England* and the other abroad.

But here, under the circumstances of this case, ought we to exercise a jurisdiction which I assume we have, and to make the order? In the first place, it is a jurisdiction which one ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on when he has a right of action as against the defendant, is a jurisdiction which has to be exercised with very considerable caution. I find here very great distinctions as to the two suits. In *America* there are the company and directors, who are subject only to the jurisdiction of the Courts there. Here we have Defendants who are resident in

(1) 7 C. B. (N.S.) 55.

England and who cannot be made subject to the jurisdiction of the American Courts, at least cannot be made subject to the jurisdiction of those Courts so as to enable any decree made by those Courts to be enforced against them. Under these circumstances one sees at once why a suit was instituted here against the English trustees, and why a suit was thought necessary in *America* against the company, and the directors, and the trustees, who are necessarily joined as parties there. Under these circumstances it is not suggested that of these two suits the second is instituted vexatiously, but it is suggested that it is vexatious to go on with both. Now if I could find a way in which I could properly interfere so as to decide that there should not be litigation in both the tribunals with reference to the same subject-matter, I should be inclined to exercise the jurisdiction. But I cannot say here that we ought to come to the conclusion, which is the principle on which the jurisdiction is to be exercised, that proceeding with these two suits in the two different tribunals is vexatious. It may be harassing, no doubt, because it is very harassing to have an action brought against one in any tribunal at all, but that is not enough. It must be vexatiously harassing the Defendant on the part of the Plaintiff, whose action is sought to be stayed; and I can see, as the Master of the Rolls has pointed out, some things which may make it necessary, or at all events desirable, for the Plaintiff, without being vexatious, to prosecute the two suits. Therefore, in my opinion, this appeal must fail. I say nothing about the question of consolidation, which has already been dealt with by the Master of the Rolls.

BOWEN, L.J.—

I am of the same opinion. During the whole of Mr. *Romer's* able argument I have felt strongly that the true answer to it was not that a case might not possibly be made out in which this Court would interfere to prevent litigation being carried on *pari passu* at home and abroad, but that this was not that case, and that there were no special circumstances here which would justify the Court in interfering. I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppres-

C. A. 1882 McHENRY v. LEWIS. Bowen, L.J.

sive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case. I think that *Cox* v. *Mitchell* (1) decided nothing more, that it simply lays down the proposition, that the mere pendency of an action abroad is not a sufficient reason for staying an action at home, although the causes of action and the parties may be the same. So understood, it seems to me to be common sense. The kind of jurisdiction which the Court exercises over litigation is, as I have said, to prevent what is vexatious and an abuse of its own process. There are many classes of cases in which the Court acts on that principle which I will not attempt now to enumerate. We are all familiar with them. This particular application is based on the suggestion that the Court ought to interfere to prevent what is called multiplicity of suits, litigation in various quarters of the world on the same subject-matter between the same parties and at the same time. Where there is more than one suit being carried on in the Queen's Courts, it is obvious that the case is wholly different. The remedy and the procedure are the same, and a double action on the part of the Plaintiff would lead to manifest injustice. When you get to the case of concurrent litigation both in the Queen's Courts in *England* and in the Queen's Courts in *Ireland* and *Scotland*, the law has probably varied a little. At a time when it was difficult to enforce the judgments of an English Court in other parts of the *United Kingdom*, it was not unreasonable that the case of *Lord Dillon* v. *Alvares* (2) should have been decided as it was. At present I think that case can no longer be cited as conclusive law. I have spoken of the Queen's Courts in *Ireland* and *Scotland*. With regard to the Queen's Courts abroad, the Consular Courts abroad, the same sort of principle no doubt applies. They are Courts of co-ordinate jurisdiction, sufficiently in the nature of English Courts to render it probable that it may be true, as Sir *Robert Phillimore* says, that

(1) 7 C. B. (N.S.) 55. (2) 4 Ves. 357.

an English Court would not favour the institution and the prosecution of litigation both in the Consular Courts and at home. But when you come to the Courts of the *United States of America*, it seems to me the case is wholly different, and for the reasons which have been pointed out at length by the Master of the Rolls and Lord Justice *Cotton*. The fact that no English action has ever yet been stayed on the ground of concurrent litigation in *America* is a strong argument to prove that such concurrent American litigation is not by itself a sufficient reason why an English action should be stayed. That the Court has power to do it I agree. It is clear not merely from reason, but from the language of Lord *Cottenham* and Lord *Cranworth*, referred to by Lord Justice *Cotton*, that this Court could do it if necessary for the purposes of justice, but some special circumstances ought surely to be brought to the attention of the Court beyond the mere fact that an action is pending between the parties on the same subject-matter in *America*. I think it is not necessary (that being the ground of my decision) to review the cases which have been cited. I think that none of them will be found to be in the least inconsistent with a single word that has fallen from the Court in the decision of this case.

COTTON, L.J.:—

I wish to add that which I had omitted, that the case might be very different after decree obtained in either of the suits.

Solicitors: *Trinders & Curtis-Hayward; Hores & Pattisson.*

M. W.

C. A.
1882
C. J. B.
July 10, 24.
C. A.
Nov. 23;
Dec. 7, 14, 15.

Ex parte SIR W. HART DYKE. *In re* MORRISH.

Leasehold Interest of Bankrupt—Disclaimer by Trustee—Lease determined before execution of Disclaimer—Landlord and Tenant—Distress for Rent after Bankruptcy—Breach of Covenant—Forfeiture—Entry—Action to recover Possession—Proof for Damages—Set-off—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 34, 39.

The trustee in a bankruptcy may disclaim a lease of the bankrupt even though the lease has been determined, by effluxion of time or by forfeiture, between the appointment of the trustee and the execution of the disclaimer. And in such a case the effect of the disclaimer, when executed, is that neither the lessor nor the trustee can claim the benefit of any provisions contained in the lease which were to come into operation at the expiration or sooner determination of the term.

Semble, that the trustee may also disclaim a lease which has been determined before his appointment.

Ex parte Paterson (1) followed and approved.

A landlord, between the filing of a liquidation petition by his tenant and the appointment of trustees, levied a distress for two half-years' rent accrued due before the filing of the petition. After the appointment of trustees the landlord levied a second distress for a third half-year's rent accrued due between the filing of the petition and the appointment of the trustees:—

Held, that the second distress was void under sect. 34 of the *Bankruptcy Act*, 1869.

Held, also, that, in respect of breaches of covenant committed by the tenant during his occupation, the only remedy of the landlord was to prove for damages in the liquidation, and that the landlord had no right of set-off as against moneys due by him to the trustee for severed crops.

When a lease contains a proviso giving the lessor a right to re-enter in the event of breach of covenant by the lessee (but not making the lease *ipso facto* void in that event):—

Quære, whether under the present practice the mere commencement of an action by the lessor to recover possession of the property for breach of covenant, or the commencement of such action followed by appearance by the trustees, will, without actual entry, operate to determine the lease.

Silcock v. *Farmer* (2) commented upon.

G. M. MORRISH occupied a farm, called *Park Gate Farm*, as tenant to Sir *William Hart Dyke*, under a lease, dated the 4th of October, 1873, for a term of twenty-one and a half years, from the 25th of March, 1873, at a rent of £750, payable half-yearly on

(1) 11 Ch. D. 908. (2) 46 L. T. (N.S.) 404.

the 29th of September and 24th of March in every year. The lease contained covenants by the lessee to pay the rent, to repair the premises, and at the expiration or sooner determination of the term to yield up the premises in good repair. The lessee also covenanted that he would, yearly and every year during the continuance of the demise, lay up and stack on the farm all the corn and grain and hay grown thereon, and from time to time consume upon the farm such of the hay, straw, haulm, clover, and roots which should be raised thereon and which should not have been sold by the lessee; and yearly and every year during the term spread on the farm all the manure proceeding therefrom (except that to be made in the last year which might be left made up in proper mixings, for labour on which the lessee was to be paid according to a valuation): Provided always, that it should be lawful for the lessee to sell from time to time and to carry off and remove from the farm any of the hay, straw, haulm, clover, or roots which should be grown thereon, on his feeding and consuming on the farm in each and every year during the continuance of the demise with cattle or sheep twenty tons of linseed cake, and also that the lessee would at the expiration or other determination of the term leave twelve acres of the arable land stocked with good hop plants, and in good order and condition, and would at all times during the continuance of the term cultivate the farm in a proper manner. The lessor covenanted that the lessee might erect on the farm cottages for labourers not exceeding six in number, and that the lessor would at the end or other sooner determination of the term pay to the lessee according to a valuation for such cottages (not exceeding six) as might have been erected by the lessee, and also for all the hay and straw grown in the last year (which should be left for the succeeding or incoming tenant) at a feed price, and for all labour on the fallows, and for all labour on manures during the last year, and for all purchased manures (except any unreasonably and unnecessarily purchased) which should be brought on the premises during the last year, and from which no benefit should have been derived, and for all seeds sown seasonably, and for all labour bestowed on stubbles after harvest, and also for the hop poles on the twelve acres of hops covenanted to be left by the lessee, and also would

C. A. 1882

Ex parte Sir W. Hart Dyke.

In re Morrish.

permit the lessee to have the use of the barns and yards on the farm until the 1st of May next after the expiration or other sooner determination of the term for the convenience of threshing out the last year's crops of corn and grain. And it was thereby declared that the several payments and allowances to be made to the lessee on his quitting the farm as thereinbefore referred to, and also the amount of any damages or compensation which the lessor might claim or be entitled to receive for or on account of any breach or non-performance of any of the covenants thereinbefore contained, and all other questions, disputes, or differences between the parties touching any of the matters therein contained should be referred to arbitration as therein mentioned. The lease also contained a proviso that if the rent should be unpaid for twenty-one days next after either of the half-yearly days of payment, or in case of any breach, default, non-performance, or non-observance of any of the lessee's covenants, or in case the lessee, his executors, administrators, or assigns, or any of them, should by their or his own act, default, or procurement, whether voluntary or not, or by act of law, or by virtue of or under any Act of Parliament, or by or through all or any such means, lose, be deprived of, or cease to be entitled to the actual possession of the demised premises, or any part thereof, or the term thereby granted, either wholly or in part, without the consent in writing of the lessor for that purpose first obtained, it should be lawful for the lessor into and upon the demised premises, or any part thereof in the name of the whole, to re-enter and the same to have again, retain, repossess, and enjoy as in his first and former estate and the lessee thereout and thenceforth to expel: Provided always, that nothing therein contained should prejudice the right of the landlord to proceed for the recovery of the rent thereby reserved when in arrear either by distress or otherwise.

In 1874 *Morrish* erected three labourers' cottages upon the farm. *Morrish* failed to pay the rent which became due on the 29th of September, 1880, and the 24th of March, 1881, respectively, and on the 5th of September, 1881, he filed a liquidation petition in the *Rochester* County Court, under which on the 23rd of September a receiver of his property was appointed, who at once took possession.

On the 13th of September, 1881, Sir *W. Hart Dyke* levied a distress on the farm for £671 9*s.* 9*d.*, being one year's rent (less deductions) for the demised premises due up to the 24th of March, 1881, and for £33 10*s.*, the expenses of the distress, and on the 10th of October these amounts were paid to him by the receiver.

On the 13th of October the creditors at their first meeting under the petition resolved on a liquidation by arrangement, and appointed three trustees, who on the same day took over possession of the farm from the receiver.

On the following day, the 14th of October, Sir *W. Hart Dyke* issued a writ in an action against the trustees to recover possession of the farm pursuant to the provisions contained in the lease.

An appearance was entered for the Defendants on the 24th of October, but no further proceedings had been taken in the action.

On the 25th of October Sir *W. Hart Dyke* levied a distress for the half-year's rent due on the 29th of September, 1881, and the expenses attending the distress.

On the 27th of October, 1881, upon the application of the trustees, an order was made by the County Court that, upon their paying the amount of the half-year's rent and the costs of the levy (£394 15*s.*) into Court, Sir *W. Hart Dyke* should withdraw from possession under the distress, and this was accordingly done. This order was made with the consent of Sir *W. Hart Dyke*, to enable the trustees to raise the question whether he was entitled to the amount paid into Court.

On the 14th of November, 1881, on the application of the trustees on notice to Sir *W. Hart Dyke*, it was ordered that the trustees should be at liberty on or before the 18th of November to disclaim the lease, upon their paying to the lessor the sum of £49 6*s.* 4*d.* for rent of the demised premises from the 5th to the 29th of September, 1881, and so far as lay in their power giving possession of the premises to him. On the same day the trustees executed a disclaimer and sent a cheque for the £49 6*s.* 4*d.* to the lessor's solicitors (which cheque was returned), and withdrew from possession of the farm, and on the 21st of November Sir *W. Hart Dyke* took possession.

C. A.
1882
Ex parte
SIR W. HART DYKE.
In re
MORRISH.

At this time, and also at the date of the appointment of the trustees there was on the farm a quantity of hay and straw which had been grown thereon, partly during the year 1880, but principally during the year 1881. The landlord claimed to be entitled to keep this hay and straw without paying anything for it; the trustees claimed it as their property, and insisted that the landlord, if he kept it, must pay for it at the market prices. The trustees also claimed to be paid by the landlord for labour on the fallows and manures expended and purchased manures during the year ending on the 13th of October, 1881; the landlord denied any such liability to pay. There were also at the same dates twelve acres of arable land stocked with hop-plants, and the trustees took possession of the hop-poles and sold them by auction, when they were purchased by the landlord for £119 18*s.*, which sum he paid to the trustees, and he claimed to be repaid this amount. There was also a question whether he was entitled to the tenants' fixtures on the farm, or whether he must pay the trustees for them, and there was a further question whether the landlord was entitled to damages for breaches of the lessee's covenants which the landlord alleged to have been committed between the date of the lease and the filing of the petition. All these questions were submitted by the parties to the determination of the County Court, a statement of facts to the effect above set forth being agreed on between them.

The Registrar, acting as Judge, decided that Sir *W. Hart Dyke* was entitled to the £394 15*s.* which had been paid into Court; that the money paid by him for the hop-poles belonged to and should be retained by the trustees; that Sir *W. Hart Dyke* must pay the trustees for the hay and straw in question at the market price on the 21st of November, the day on which he took possession of it; that he was not liable to pay the trustees for the three cottages, nor for any of the acts of husbandry mentioned in the statement of facts, nor for the tenant's fixtures; and also that he was not entitled to make any claim for damages in respect of breaches of covenant.

The trustees appealed to the Chief Judge against so much of the order as directed that the £394 15*s.* should be paid to Sir *W. Hart Dyke*, and he appealed against so much of the order as directed

that he should pay for the hop-poles, and the hay and straw, and by which it had been declared that he was not entitled to claim any damages for breaches of covenant by the lessee.

The appeals were heard on the 10th and 24th of July, 1882.

Winslow, Q.C., and *C. Browne*, for the trustees :—

The disclaimer of the debtor's lease operated as an extinguishment of the whole lease from the date of the appointment of the trustees, and put an entire end to the relation of lessor and lessee as if it had never existed: *Ex parte Glegg* (1). The landlord therefore was not entitled to levy a distress on the 25th of October, 1881, after the trustees had been appointed, as the relation of landlord and tenant no longer existed; and also because the distress was levied in respect of rent which did not accrue due until after the commencement of the liquidation: *Bankruptcy Act*, 1869, s. 34. With respect to the hay and straw, although the claim of the trustees under the covenants contained in the lease fell with the lease by operation of the disclaimer, the hay and straw were chattels, being severed from the estate, which vested in the trustees, and must be paid for by the lessor at the market price.

Pollard, in support of Sir *W. Hart Dyke's* appeal :—

The distress of the 25th of October, 1881, was valid, as upon the appointment of the trustees in liquidation the lease, and all obligations under it, vested in them not only by operation of the statute, but by virtue of the possession which was taken by them; and therefore the lessor was entitled as against the trustees to distrain for rent which accrued due after the commencement of the bankruptcy: *Ex parte Hale* (2); 8 Anne, c. 14, s. 6.

The result of the cases upon sect. 23 of the *Bankruptcy Act*, 1869, is that the lease is to be treated not as if it had never existed, but as if it had been determined by surrender at the date when the adjudication was made, or (in the case of liquidation by arrangement) when the trustees were appointed, and to relieve the bankrupt and his trustees from all liabilities under the lease after that date, *i.e.*, to give back to the lessor the entirety of the

(1) 19 Ch. D. 7. (2) 1 Ch. D. 285.

C. A. 1882

Ex parte SIR W. HART DYKE. *In re* MORRISH.

property comprised in the lease with a corresponding release of the tenant from the covenants and obligations therein contained: *Ex parte Allen* (1) (qualifying and explaining *Ex parte Glegg* (2)); *Ex parte Brook* (3). And the disclaimer by the trustees on the 14th of November, 1881, cannot operate retroactively so as to render invalid the distress of the 25th of October, 1881, for the half-year's rent due on the 29th of September, 1881, such distress being valid at the time when it was levied, or to divest any estate or right vested in the landlord to recover rent which had accrued due, and formed part of the landlord's estate, between the commencement of the liquidation and the disclaimer: *Ex parte Corbett* (4); *Smyth* v. *North* (5). But on the 14th of November, 1881 (when the disclaimer was executed) there was no longer any lease to disclaim, as the lessor had previously (14th October), by bringing an action to recover possession of the farm, exercised his option of determining the lease on the ground of forfeiture, and from that date the lease and all rights founded upon it came to an end: *Jones* v. *Carter* (6); *Grimwood* v. *Moss* (7); *Toleman* v. *Portbury* (8); *Wilson* v. *Wallani* (9). Assuming, therefore, that the writ in the action had the effect of determining the lease, the condition that the landlord shall pay for the hay and straw and hop-poles is gone also, and in the absence of any stipulation his right to them without payment is absolute: *Silcock* v. *Farmer* (10); 56 Geo. 3, c. 50, s. 11.

[BACON, C.J.:—The words of the covenant "at the end or sooner determination of the lease" are plain. The landlord was a party to the bankruptcy, and the disclaimer put an end to the action.]

If the obligation arises under a covenant contained in a lease, the obligation cannot be enforced when the lease is gone. In any case the trustees are only entitled to be paid for the hay and straw at the "feed" price, viz., one-half the market value: *Clarke*

(1) 20 Ch. D. 341.
(2) 19 Ch. D. 7.
(3) 10 Ch. D. 100.
(4) 14 Ch. D. 122.
(5) Law Rep. 7 Ex. 242.
(6) 15 M. & W. 718.
(7) Law Rep. 7 C. P. 360.
(8) Ibid. 6 Q. B. 245.
(9) 5 Ex. D. 155.
(10) 46 L. T. (N.S.) 404.

v. *Westrope* (1); *Woodfall* on Landlord and Tenant (2). Under sect. 39 the lessor is entitled to have the damages assessed, and is only liable to pay to the trustees the balance found due after taking the account: *Ex parte Hope* (3).

Winslow, in reply:—

The action by the lessor to recover possession does not affect the right of the trustees to disclaim the lease: *Ex parte Paterson* (4). If the disclaimer is good the whole lease is gone for all purposes, and the rights of the lessor as well as those of the lessee are at an end: *Ex parte Glegg* (5); and there is no personal liability on the part of the trustees in respect of the lease between the adjudication (in this case the filing of the petition) and the execution of the disclaimer: *Lowrey* v. *Barker* (6); the only right of the lessor who is injured by the effect of the disclaimer being to prove the extent of his injury as a debt under the bankruptcy: sect. 23. The fact that he has distrained twice cannot enable him to prove for more than one year's rent accrued due prior to the date of the order of adjudication: sect. 34.

Pollard called attention to sect. 125 (4), that the liquidation by arrangement "shall be deemed to have commenced as from the date of the appointment of the trustee."

Winslow, Q.C.:—*Ex parte Duignan* (7) decides that the filing of a petition for liquidation by arrangement is an act of bankruptcy, so that the property of the debtor vests in the trustee, not on his appointment, but, by relation back, on the filing of the petition. By bringing his action to recover possession, the lessor exercised his option of determining the lease and cannot afterwards be allowed by levying a distress to treat it as valid and still in existence: *Jones* v. *Carter* (8).

Pollard:—My contention was that under 8 Anne, c. 14, the

(1) 18 C. B. 765.
(2) 12th Ed. p. 734.
(3) 27 L. J. (Bkcy.) 40; 6 W. R. 789. 3 De G. J. 94 4 Jur. N.S. 1164
(4) 11 Ch. D. 908.
(5) 19 Ch. D. 7.
(6) 5 Ex. D. 170.
(7) Law Rep. 6 Ch. 605.
(8) 15 M. & W. 718.

C. A. 1882

Ex parte Sir W. Hart Dyke. *In re* Morrish.

landlord was entitled to distrain after the determination of the lease if the tenant was still in occupation.

Winslow, Q.C.:—The tenant in this case had ceased to be in possession, the possession being that of the trustees.

Pollard replied upon the cases cited by *Winslow* in his reply.

Bacon, C.J.:—

This is in substance merely an attempt by the landlord to get property which belongs to other people. It would be a strange kind of law if I could take the course suggested by the learned counsel. I have listened very attentively to the long and elaborate arguments which have been addressed to me and to a number of cases cited which have in my opinion nothing whatever to do with the matter before me.

The first question I have to decide is under the statute relating to the landlord's right to distrain. After the commencement of the bankruptcy a landlord may distrain for twelve months' rent and no more. Here he has distrained for twelve months' rent, and then he comes subsequently and distrains for another six months' rent; that last distress cannot be maintained, and the order made by the learned Registrar in the Court below in favour of the landlord must therefore be discharged. With respect to the other question, I am willing to consider with all possible respect all the decisions that have been cited, as indeed I am bound to do. I must treat the matter as if there never had been a lease.

The tenant goes in to cultivate the land, and in the course of doing so he collects hay and straw. Whose is it? It belongs to him and to nobody else.

There can be no suggestion of the landlord's paying for it at feed price, because he could only do so by having recourse to the lease, which by common consent is gone as much as if it never existed.

On what principle of law, either in the case in which Lord Justice *Brett's* decision was referred to (*Silcock* v. *Farmer* (1)), or

(1) 46 L. T. (N.S.) 404.

in any other decision, can it be said to belong to the landlord, and that he can take this man's property as his own. When did it ever cease to be the property of the tenant? If the lease had been subsisting, at the end of the term the landlord would have had to pay for it, and if the lease comes to a prior determination it is to be paid for. The lease does come to a premature determination, but the hay and straw remain, and in my opinion must be paid for. That is as plain as anything can be.

In the first instance it is an appeal by the trustees against the order giving the landlord half a year's rent of the land, which sum ought by law and of right to be administered among the creditors of the bankruptcy. I am of opinion that that order cannot be sustained and must be discharged.

Then the other point is an application for an order declaring that the money paid for the hop poles belongs to the trustees, and that the hay and straw should be taken at the market price, if it is to be taken at all. Mr. *Pollard* almost assented to that. I do not mean to say he admitted it, but his argument that if taken at all it should be at feed price, and not at market price, cannot be supported without having recourse to the lease, which by common consent is not in existence. I cannot assent to that argument. As to the decision of the Master of the Rolls, I am bound by it. It has been put before me in many cases before, and at all events there it is. The lease is gone and I cannot read "feed price" out of it. I find that the landlord has had the benefit of taking possession of the tenant's property, and I think it perfectly right that he should pay for it.

The amount of that is to be ascertained. The parties will not differ about that I suppose. Then the declaration that the landlord is not to be liable to pay for the cottages and the several things mentioned and included in the 28th paragraph of the statement of facts, nor for the tenant's fixtures, is in my opinion quite right.

Then there is a declaration that the landlord is not entitled to make any claim for damages in respect of breaches of covenants under the lease mentioned in the 32nd paragraph of the statement of facts. It is not for breach of covenant that damages are to be claimed. If any damage has been done to anything

C. A. 1882 *Ex parte* Sir W. Hart Dyke. *In re* Morrish.

belonging to the landlord he may be entitled to prove for that damage, but not for any breach of covenant. He may claim for wrong that has been done, because a right of action exists independent of any lease. That may be now ascertained, but it is not worth while, I suppose, to bring it forward now that the bankruptcy has occurred. There will be no set-off. There can be no mutual dealings between a man who has suffered a wrong, and the man who has done a wrong.

F. G. A. W.

C. A.

From this decision Sir *W. Hart Dyke* appealed.

The appeal was heard on the 23rd of November, and the 7th, 14th, 15th of December, 1882.

Pollard, and *F. G. Randolph*, for the Appellant:—

The landlord was entitled to levy the distress for the half-year's rent due at Michaelmas, 1881, and the sum which was paid into Court ought to be paid out to him. If the lease was determined by the bringing of the action still the distress is made valid by the Act, 8 Anne, c. 14, s. 6. And sect. 34 of the *Bankruptcy Act*, 1869, does not affect the landlord's right. The first distress was for rent which accrued due before the filing of the petition, and when it was levied the appointment of the trustees, which corresponded to the adjudication in a bankruptcy, had not been made. The subsequent disclaimer does not make the distress bad by reason of its relation back to the appointment of the trustees. The lease had not then vested in the trustees, and by reason of their disclaimer it never did vest in them. The title of the trustee in a liquidation does not relate back as in a bankruptcy for all purposes: *Bankruptcy Act*, 1869, s. 125, sub-s. 4; *Ex parte Duignan* (1).

The lease was determined by the issue of the writ in the action of ejectment, or at any rate by the appearance of the trustees, and there was no longer any lease for the trustees to disclaim, and consequently the disclaimer had no operation whatever, and the rights given by the lease to the landlord on the determination of the term took effect. Formerly if a landlord brought an action

(1) Law Rep. 6 Ch. 605.

of ejectment against his tenant for a forfeiture the issue of the writ did not, in a case where the lease only gave the landlord a right to enter for the forfeiture, operate to determine the lease. That effect was only produced by the consent rule which admitted entry. But since the passing of the *Common Law Procedure Act*, 1852, the mere issue of the writ operates to determine the lease, at any rate on the appearance of the defendant. The landlord by issuing the writ unequivocally elects to exercise his option to forfeit the lease, and that is equivalent to actual entry: *Jones* v. *Carter* (1); *Grimwood* v. *Moss* (2) (3); *Cole* on Ejectment (4); *Birch* v. *Wright* (5); *Franklin* v. *Carter* (6); *Bridges* v. *Smyth* (7); *Wilson* v. *Wallani* (8); *Kennedy* v. *Liddy* (9); *Lord Talbot de Malahide* v. *Odlum* (10); *Dendy* v. *Nicholl* (11); *Doe* v. *Rollings* (12).

[JESSEL, M.R., referred to *Little* v. *Heaton* (13).]

Goodright v. *Cator* (14); *Duppa* v. *Mayo* (15); *Scarf* v. *Jardine* (16); *Croft* v. *Lumley* (17); *Platt* on Leases (18); *Common Law Procedure Act*, 1852, ss. 168, 210, 212, 221. At any rate some of the hay and straw in question was grown in the year before the last year of the tenancy, and the landlord is entitled to buy that part at feed price. But we claim more than that. The tenant's covenant not to remove the hay and straw but to consume it on the farm, unless a specified amount of linseed cake is consumed instead, is equivalent to a covenant not to remove the hay and straw at all, unless the condition precedent has been fulfilled.

[JESSEL, M.R.:—The property does not pass to the landlord. He is only entitled to damages for breach of the covenant.]

(1) 15 M. & W. 718.
(2) The lease in the case of *Grimwood* v. *Moss* was produced, and it appeared that the proviso gave the lessor a right to re-enter in case of a breach of covenant, but did not make the lease *ipso facto* void.
(3) Law Rep. 7 C. P. 360.
(4) Pages 82, 635, 636.
(5) 1 T. R. 378.
(6) 1 C. B. 750.
(7) 5 Bing. 410.
(8) 5 Ex. D. 155.
(9) Ir. Rep. 1 C. L. 105.
(10) Ir. Rep. 5 C. L. 302.
(11) 4 C. B. (N.S.) 376.
(12) 17 L. J. (C.P.) 268.
(13) 2 Ld. Raym. 750.
(14) 2 Doug. 477, 484.
(15) Saunders by Williams (ed. 1871), vol. i. p. 436.
(16) 7 App. Cas. 345.
(17) 6 H. L. C. 672.
(18) Vol. ii. pp. 327, 328.

C. A. 1882

Ex parte SIR W. HART DYKE. *In re* MORRISH.

On a forfeiture the landlord is entitled to take the hay and straw without paying anything for it, and the right of the trustees is no higher than that of the debtor; 56 Geo. 3, c. 50, s. 11; *Silcock* v. *Farmer* (1). Severed crops are not the property of the tenant in the same sense as chairs and tables. The *Bankruptcy Act*, 1869, cannot repeal the special provisions of the Act of Geo. 3, unless it is necessarily inconsistent with them.

As to the effect of the disclaimer, supposing that it would have any operation in this case, the Chief Judge was wrong in saying that after its execution the lease must be taken never to have existed. The disclaimer operates only as a surrender as to future rights and obligations; it does not divest any accrued rights or obligations. It does not affect any previously vested right of action. If rent has accrued due the lessor remains a specialty creditor in respect of it: *Attorney-General* v. *Cox* (2).

[JESSEL, M.R.:—That was only a decision that a surrender of a lease did not destroy the personal covenant of the lessee to pay the rent.]

The effect of the disclaimer is only that of a surrender *inter partes*. The Court will endeavour so to construe sect. 23 so to avoid hardship or injustice to the landlord: *Ex parte Brook* (3); *Lowrey* v. *Barker* (4).

The landlord is entitled to set off any damages to which he may be entitled for breach of covenant by the tenant against any payments which he may have to make to him: *Peat* v. *Jones* (5). At any rate the landlord is entitled to prove for the damages.

Winslow, Q.C., and *C. Browne*, for the trustees:—

[JESSEL, M.R.:—We think the Act of *Anne* does not apply to the second distress.]

The title of the trustee in a liquidation relates back just as that of the trustee in a bankruptcy. The Appellant has got a year's rent by his first distress, and under sect. 34 he is not entitled to recover any more in that way.

(1) 46 L. T. (N.S.) 404.
(2) 3 H. L. C. 240.
(3) 10 Ch. D. 100.
(4) 5 Ex. D. 170.
(5) 8 Q. B. D. 147.

The lease was not determined by the issue of the writ in the action: *Toleman* v. *Portbury* (1).

[JESSEL, M.R.:—The point was not taken there.]

None of the cases cited decide the point, except *Lord Talbot de Malahide* v. *Odlum* (2). Sect. 53 of the *Landlord and Tenant Act* (*Ireland*), 23 & 24 Vict. c. 154, shews that the Legislature thought that, notwithstanding the *Common Law Procedure Act* of 1852, it was still necessary in an action of ejectment to prove actual entry, and there is nothing to shew any intention to alter the law in this respect.

But the question whether the bringing of the action determined the lease is immaterial. Assuming that it did, still the lease had vested in the trustees on their appointment, and a trustee can disclaim a lease which has come to an end before the execution of the disclaimer. This was expressly decided by the Court of Appeal in *Ex parte Paterson* (3). There the lease had expired by effluxion of time, but the principle applies equally to a lease which has been determined by forfeiture. If the trustee could not disclaim in such a case he would be subject to liabilities under the lease, and it was the intention of the Act to relieve him from all liability. When the trustee accepts his office he does not know at once under what liabilities the bankrupt or debtor is by virtue of leases. The bankrupt may have run away and several years' rent may be due. The effect of the disclaimer is to destroy the lease as on the date of the appointment of the trustees, *i.e.*, in this case on the day before the writ was issued in the action. And the disclaimer destroys the lease altogether, so that neither party can claim any of the benefits given to him by its provisions: *Ex parte Glegg* (4); *Ex parte Allen* (5). We are willing that the Appellant should pay only the feed price for the hay which was grown in the year before the last.

Silcock v. *Farmer* (6) does not apply; there was no disclaimer in that case; if the lease had been surrendered the landlord could not have founded any claim on the covenants contained in it.

(1) Law Rep. 6 Q. B. 245; Ibid. 7 Q. B. 344.
(2) Ir. Rep. 5 C. L. 302.
(3) 11 Ch. D. 908.
(4) 19 Ch. D. 7.
(5) 20 Ch. D. 341.
(6) 46 L. T. (N.S.) 404.

C. A. 1882

Ex parte Sir W. Hart Dyke.

In re Morrish.

The landlord is not entitled to be paid in full any damages for breach of covenant, and he has no right of set-off. Under sect. 23 his right is to prove in the liquidation for any injury caused to him by the disclaimer.

Randolph, in reply :—

The trustees were the Defendants to the action. There could be nothing to disclaim when the disclaimer was executed. The effect of the construction suggested would be to take away the landlord's right to determine the lease after the appointment of the trustee : *Titterton* v. *Cooper* (1). In *Ex parte Paterson* (2) the bankrupt was the assignee of a lease, and it was his trustee who had disclaimed. The disclaimer could not affect the rights of the lessor against the original lessee.

[Jessel, M.R. :—At that time *Ex parte Walton* (3) had not been decided.]

It would be a great hardship if the landlord could be deprived of his option to determine the lease by the subsequent disclaimer of the trustee : *Ex parte Brook* (4). At any rate *Silcock* v. *Farmer* (5) is a direct authority that the landlord is entitled to the hay and straw without paying for it.

[Jessel, M.R. :—In that case the covenant was not to remove the hay and straw at all.

Cotton, L.J. :—Could you have obtained an injunction to restrain the removal ?

Jessel, M.R. :—How could the tenant consume the hay and straw on the farm after the lease had been surrendered ? It is an alternative covenant ; there is nothing to take the property in the hay and straw away from the tenant. The covenant is to do something during the term ; he cannot do it when the term has been put an end to.]

The Act 56 Geo. 3, c. 50, s. 11, preserves the rights of the landlord.

(1) 9 Q. B. D. 473.
(2) 11 Ch. D. 908.
(3) 17 Ch. D. 746.
(4) 10 Ch. D. 100.
(5) 46 L. T. (N.S.) 404.

JESSEL, M.R.:—

Several points are raised by this appeal. The time of the Court has been occupied with a very interesting argument, the great bulk of which it is not necessary for us to consider at all. The first point taken was that the landlord, who had distrained for a year's rent, and who then distrained for another half-year's rent, was entitled to distrain for the third half-year's rent, although he had already distrained for a year's rent. Well, it appears to me that that point is completely covered by the 34th section of the statute, which limits the landlord to one year's rent, and that the Appellant has got, as was pointed out by the Chief Judge, all that he is entitled to. In my opinion on that point the Chief Judge's decision is clearly right.

The next point is this. It is said that the landlord, having brought an ejectment action against the trustees after the commencement of the liquidation, thereby put an end to the lease, and a great deal of ancient and modern learning was examined into in order to see whether that was so or not. But the answer of the trustees is, That question is wholly immaterial, because the lease actually vested in the trustees, certainly for a day, and they are entitled to disclaim it, and they have disclaimed. I do not intend to confine my observations to this particular case, and to say that it is absolutely necessary that the lease should have actually vested in the trustee on his appointment, because it is quite possible that a lease might have come to an end before his appointment, and that still it might be allowable for him to disclaim it. But in this particular case the lease actually vested in the trustees when they were appointed, and it was decided by the Court of Appeal in *Ex parte Paterson* (1) that a trustee may disclaim a lease although the bankrupt's interest, that is, the term, has come to an end, because the trustee might be under very serious liabilities if he was not allowed to disclaim. However, that has been decided by the Court of Appeal. Consequently these trustees disclaimed. What is the effect of the disclaimer? This has been decided by the Court of Appeal twice, in *Ex parte Glegg* (2) and in *Ex parte Allen* (3). It puts an end to the lease, not merely to the term, but to the lease itself. On the one hand, therefore, it deprives the landlord of the future benefit of all those

(1) 11 Ch. D. 908. (2) 19 Ch. D. 7. (3) 20 Ch. D. 341.

C. A. 1882

Ex parte Sir W. Hart Dyke. *In re* Morrish.

Jessel, M.R.

clauses of the lease which give him a benefit; and, on the other hand, it deprives the tenant of the future benefit of all those clauses of the lease which give him a benefit. The result, therefore, is that in the present case neither party can claim the benefit of those provisions of the lease which arise only at the end or other sooner determination of the lease, and that is the main point of the case. The Chief Judge, therefore, was, in my opinion, right in holding that the tenant had lost his right to be paid for the cottages and tillages, and, on the other hand, that the landlord had lost his right to take the hay and straw at feed prices, or at any other than the market price.

This determines all the questions between the parties, except a very small question as to some hay and straw, said by the Respondents to be worth £23, and said by the Appellant to be worth something more, which was cut, not in the last year of the tenancy, but in the previous year. As to that I must say that my mind has been rather exercised by the case of *Silcock* v. *Farmer* (1). I have not been able to extract from that case any new principle, and I am not quite confident that I know exactly what was the ground of the decision. Therefore, I would rather not say anything more about it. But it appears to me quite clear that what is offered by the Respondents is quite right, that is, that the landlord shall take that portion of the hay and straw at feed prices, because in that way he will get the benefit of the arrangement. That portion should have been consumed on the premises by the tenant. I am satisfied that that is a just offer. It is a very small sum, but in that respect there will be a variation in the order, which is assented to by the Respondents.

In all other respects the order appears to me to be right.

The only other claim made on the part of the Appellant is one which certainly cannot be entertained. He says that the tenant has committed some breaches of covenant. Well, if he has, the Appellant can prove for damages in respect of them. He can prove for damages, but he cannot set off his claim against the property of the trustees, because the hay and straw are now the property of the trustees. Subject to the slight variation which I have mentioned, the orders appealed against will be affirmed, and the Respondents will have their costs.

(1) 46 L. T. (N.S.) 404.

COTTON, L.J. :—

I agree. A question was argued at considerable length as to the effect of the action which was brought by the landlord to recover possession, but, in my opinion, it is unnecessary to decide what that effect was, because there was a subsequent disclaimer of the lease by the trustees, and under sect. 23, that disclaimer takes effect as from the date of the appointment of the trustees. And that being so, it gets rid of the liability of the trustees, even if an end was put to the lease by the appearance of the trustees in the action. But it is urged, and certainly I was at first very much struck by that argument, that the disclaimer, executed after the lease had been put an end to, was ineffectual. But, however startling the result may be, that a man may disclaim a thing which does not exist, yet there is the decision of the Court of Appeal in *Ex parte Paterson* (1) to that effect. Looking at the terms of the order in that case, I think it was intended so to decide as against the landlord. But, independently of that decision, I think the case comes within the words of this extraordinary 23rd section, which orders us to imagine a number of things as done which in fact have not been done and do not exist. On the execution of the disclaimer the lease is to be deemed to have been surrendered as from the date of the adjudication, not as from the date of the disclaimer. Now here, undoubtedly, this property was for a time vested in the trustees, and, that being so, it is property of the bankrupt acquired by the trustees to which the section applies. Of course, there is a reason in this provision. The section was intended to protect the trustee (and also to protect the estate of the bankrupt from the liability to indemnify the trustee), as regards any liability to which he might become subject during the period for which the lease was vested in him. In my opinion, therefore, however startling the result may be, we must come to the conclusion that, even if the lease was put an end to by the bringing of the action and the appearance of the trustee, yet the disclaimer went back behind it, and put an end to the lease as by a surrender at a previous date.

The only other question to which I think it necessary to refer is whether *Silcock* v. *Farmer* (2) applies. There there was an abso-

(1) 11 Ch. D. 908. (2) 46 L. T. (N.S.) 404.

C. A. 1882 *Ex parte* Sir W. Hart Dyke. *In re* Morrish. Cotton, L.J.

lute covenant by the tenant not to remove the hay and straw, and really the only question to my mind is whether we can construe the covenant in the present case as having the same effect. Though the language is not very clear, I think it would not be right to do so. There is first a covenant as to the way in which the farm is to be dealt with as a matter of cultivation during the existence of the lease. Then there is a covenant as to what is to be done with regard to the hay and straw which is to be left at the end of the term, and is to be taken by the landlord at feed prices. But here the surrender has put an end to that covenant. As regards covenants which were only to take effect after the period at which the surrender takes effect they are gone, and, although these two covenants were probably intended by the landlord and tenant to have the effect of preventing the removal of the hay and straw, unless there was an equivalent quantity of good manure put on the farm by means of feeding with oil-cake, yet there is not an absolute covenant not to remove the hay and straw, but only a covenant providing for the cultivation during the continuance of the term, and providing for the mode in which the hay and straw which could not be used in ordinary course on the farm, namely, that grown in the last year, should be dealt with. In my opinion, there is not here, as there was in *Silcock* v. *Farmer* (1), an absolute covenant not to remove the hay and straw at any time, and I think therefore that case does not apply.

Bowen, L.J.:—

I am of the same opinion. The point which has occupied the attention of the Court during now nearly two days, is one of the very greatest possible importance, viz., whether, since the *Common Law Procedure Act* of 1852 and the *Judicature Acts* the issuing of a writ of ejectment, at all events after the appearance of the Defendant, is equivalent to re-entry by the landlord. The Court is, however, not called upon to decide that question. A good deal has been said about it, but when it is not necessary to decide a point, it is much better not to decide it. Upon a further examination of the case it appears that that question is irrelevant, because, although the writ of ejectment was served on the 14th of October, the trustees had been appointed on the 13th, so that

(1) 46 L. T. (N.S.) 404.

C. A.
1882
Ex parte SIR W. HART DYKE. *In re* MORRISH.
Bowen, L.J.

the writ was not issued till after the lease had vested in the trustees. Then, what is the effect of the subsequent disclaimer? I agree with the Master of the Rolls that it is not necessary to decide whether, even if the lease had expired before the appointment of the trustees, there might not still be, having regard to the interpretation clause (sect. 4) of the *Bankruptcy Act*, something upon which the disclaimer could operate. In the present case there was, at all events, something which did actually vest in the trustees on their appointment. That which vested in them was a lease, and the disclaimer put an end to that lease, and the effect of the disclaimer is, beyond all controversy, set at rest by the decisions of this Court, and sect. 23 of the Act seems to me to have rendered it imperative on the Court to give those decisions, because sect. 23 says that, when there is a disclaimer of a lease, the lease is to be deemed to have determined as from the date there mentioned, and as if it was—not forfeited, or ended, or expired—but surrendered. That is to say, the parties are put by the statute in the position of persons who have voluntarily agreed the one to make and the other to accept a surrender of the lease, although they have really done nothing of the kind, and from that somewhat peculiar enactment all the other consequences seem to me to follow by a stern logic. I agree that after a surrender of this kind—a statutory surrender—neither party can claim the benefit of those provisions of the lease which come into effect only at its expiration or other sooner determination.

As to *Silcock* v. *Farmer* (1), I entirely agree with what Lord Justice *Cotton* has said. It appears to me that the decision there turned upon a different covenant.

Randolph asked for leave to appeal to the House of Lords.

JESSEL, M.R.:—No. We do not think we have decided anything new.

Solicitors for landlord: *Meynell & Pemberton.*

Solicitors for trustees: *Makinson & Carpenter*, agents for *C. R. Gibson, Dartford.*

(1) 46 L. T. (N.S.) 404.

W. L. C.

C. A.
1882
KAY, J.
Aug. 3.
C. A.
Nov. 10, 11.

RAYMOND *v.* TAPSON.

[1881 R. 2434.]

Practice—Evidence after Decree—Right to subpœna Witness—Leave of the Court —Proceedings in Chambers—15 & 16 *Vict. c.* 86, *ss.* 40, 41 [*Revised Ed. Statutes, vol. xi. pp.* 522, 523]—*Rules of Court*, 1875, *Order* XXXVII. *r.* 4.

Any party may without leave of the Court issue a subpœna for the examination of a witness at any stage of an action; but the Court will exercise a control over this privilege to prevent its being oppressively used.

In an action for the redemption of a mortgage the usual judgment was obtained and the Defendant, the mortgagee, proceeded to vouch his accounts in Chambers. The Plaintiff subpœned a solicitor who had acted for both parties in the mortgage transactions, in order to examine him with respect to the moneys received by him on account of both parties:—

Held, that the Plaintiff was entitled to issue the subpœna and to examine the witness.

THE action in this case was brought by *N. R. Raymond* against *J. J. Tapson* for the redemption of freehold lands at *Devonport*, mortgaged to the Defendant for £1600. The Defendant was in possession of the mortgaged property.

On the 18th of March, 1882, judgment was given in the action for the usual accounts as between a mortgagor and a mortgagee in possession, and for redemption by the Plaintiff on paying what should be found due from him.

At the time of the mortgage Mr. *T. H. Gill* acted as solicitor for both mortgagor and mortgagee. Mr. *Gill* had delivered an account of his receipts and payments for and on behalf of the Plaintiff under an order taken out by the Plaintiff.

In pursuance of the judgment in the action the Defendant brought into the Chambers of Vice-Chancellor *Hall* his account of receipts and payments, but when the matter came before the Chief Clerk the Plaintiff applied for permission to use on his behalf Mr. *Gill's* account of receipts and payments. The Chief Clerk refused permission for this to be done, and the Plaintiff then took out a subpœna to examine Mr. *Gill* as a witness with regard to the moneys received and paid to him on account of both Plaintiff and Defendant.

Mr. *Gill* having attended before the examiner declined to be sworn on the ground that the issuing of the subpœna was irregular.

The Plaintiff then moved before Mr. Justice *Kay* on the 3rd of August, 1882, for an order directing Mr. *Gill* to attend before the examiner to be examined.

Renshaw, for the Plaintiff.

Eyre, for the Defendant.

KAY, J.:—

I think I must accede to this application. There is an inquiry pending in Chambers and an account has been directed to be taken, evidence has been filed by the person who is directed to furnish that account, and the Plaintiff wants to put in evidence upon his own side relating, as I understand, to that account. The practice was perfectly settled before the *Judicature Act* by sects. 40 and 41 of the 15 & 16 Vict. c. 86. Sect. 41 provides that "In cases where it shall be necessary for any party to any cause depending in the said Court to go into evidence subsequently to the hearing of such cause, such evidence shall be taken as nearly as may be in the manner hereinbefore provided with reference to the taking of evidence with a view to such hearing;" and sect. 40 says that, "Any party in any cause or matter depending in the said Court may by a writ of *subpœna ad testificandum* or *duces tecum* require the attendance of any witness before any examiner of the said Court or before an examiner specially appointed for the purpose, and examine such witness orally for the purpose of using his evidence upon any claim, motion, petition, or other proceeding before the Court in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used, or which shall be used, on any claim, motion, petition, or other proceeding before the Court, shall be bound, on being served with such writ, to attend before an examiner for the purpose of being cross-examined." Reading the two sections together, any party may by subpœna take the evidence of a witness after

C. A. 1882 RAYMOND v. TAPSON. Kay, J.

the hearing as well as at the hearing. There are two authorities, the one *Anonymous* (1), which decided that a special order for the examination of a witness under sect. 41, that is after the hearing, was not necessary, and there is the more emphatic case of *Howard* v. *Sewell* (2), where there being an application that a subpœna might issue, it was treated by Vice-Chancellor *Stuart* as being so entirely unnecessary that the motion was refused with costs, that is to say, you do not want my help, you may issue a subpœna without any help and you may take evidence under that section without the Court interfering in any way.

The *Judicature Act* has an express provision that the old practice remains except so far as it is altered by that Act and the new rules. Is this practice altered by the Act and the new rules? The only rule referred to is rule 4, of Order XXXVII., which provides that "The Court or a Judge may, in cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct."

I should have said, without the repetition of the word "any" so often in that clause, that it plainly was intended to be an enabling clause to provide for the taking of evidence in cases where the ordinary practice did not provide for it, and it gave the Court power to take evidence, and the examiner to take evidence *de bene esse* where for the moment the cause was not at issue, and you wanted evidence for the hearing, and in like cases. But it is attempted here to read that as restrictive, as though it had abolished (although it does not refer to it) the old practice of taking evidence after the hearing which was expressly provided for by these sections which I have read of 15 & 16 Vict. c. 86, and had substituted for that old practice the necessity of getting the leave of the Court. I think it is very unreasonable to suppose so, particularly when you consider that the consequence would be that these sections referring to the taking of evidence

(1) 23 L. J. (Ch.) 24. (2) 1 W. R. 124.

C. A. 1882 RAYMOND v. TAPSON. Kay, J.

vivâ voce would not restrict parties in the position of this Plaintiff from putting in evidence by affidavit, but would restrict them from putting in *vivâ voce* evidence on a subpœna. I cannot conceive that that is the meaning. To my mind it plainly is not the meaning.

There is nothing that I know of, and no other section and no other order has been referred to, which in the least interferes with the old practice. I find it settled by the two authorities I have mentioned that no order of the Court is wanted to enable a person who desires so to do to put in *vivâ voce* evidence after a decree for the purpose of a pending inquiry under that decree. And it seems to me that it is quite clear under the sections of 15 & 16 Vict. c. 86, which I have read, that he could do that by subpœnaing the witness without the leave of the Court. These two cases I have referred to shew that no order of the Court is wanted, and therefore, I think this application is quite right and I must order this witness to attend at his own expense before the examiner by a day to be named.

C. A.

From this order the Defendant and Mr. *Gill* appealed.

The appeal came on for hearing on the 10th of November, 1882.

Kekewich, Q.C., and *Renshaw*, for the Appellants :—

Under the old practice when a subpœna was required for proceedings in Chambers it was done upon a note from the Judge under Cons. Order XXXV., r. 29. The 15 & 16 Vict. c. 86, s. 41, and the cases referred to by Mr. Justice *Kay*, *Anon.* (1), and *Howard* v. *Sewell* (2), referred to the evidence to be read in Court. But whatever the practice was before the *Judicature Act*, it is now regulated by Order XXXVII. rule 4, which implies that an order should be made by the Judge. Great expense and oppression will be caused if any person can take out a subpœna as he pleases in proceedings in Chambers. In the present case the examination of Mr. *Gill* is quite unnecessary in the present stage. The mortgagee having only now to vouch his accounts, if any items are objected to the time will then come for going into evidence upon them.

(1) 23 L. J. (Ch.) 24. (2) 1 W. R. 124.

C. A. 1882 RAYMOND v. TAPSON.

Eyre, for the Plaintiff, was not called on.

JESSEL, M.R. :—

This is an appeal from a decision of Mr. Justice *Kay*, but I am not quite satisfied that the case was fully gone into before him. The case is this: judgment in a redemption action having been given, the mortgagee has brought in his account, the accuracy of which is challenged by the Plaintiff. The same solicitor, Mr. *Gill*, acted for both parties, and received the rents of the property. He delivered an account between the mortgagor and himself, and the mortgagor tendered this account before the Chief Clerk. It was rejected, and I think properly, by the Chief Clerk. Then the mortgagor says, that not being able to bring in the account, he claims to subpœna Mr. *Gill* to prove the items in the account, and he accordingly issues the subpœna. The old practice was to call on the witness to attend before the examiner which he was bound to do on being paid his expenses. Mr. *Gill* attended but refused, by advice of counsel, to give evidence. And then an appeal was made to Mr. Justice *Kay*. I think there was no irregularity in this. It is said that no subpœna can be issued without leave of the Court. But under sect. 41 of the *Chancery Improvement Act* (15 & 16 Vict. c. 86) this might have been done without the leave of the Court. Of course there was always a power in the Court to prevent an abuse of this power, but except this control and the liability to pay the witness's expenses, there was no other check. If the witness did not attend he ran the risk of attachment; and on the other hand if there was any suspicion of oppression, the Court would take notice of it as of any other kind of professional misconduct on the part of the solicitor. The practice worked well but there were occasional extraordinary exceptions, especially when parties conducted their own cases. I see no reason for cutting down the words of the section. The same practice has existed in the Common Law Courts from time immemorial.

Since the *Judicature Act* the practice in all the Courts has been that any one may take out a subpœna. I see no reason why the leave of the Court should be necessary. The Court has still the power to say when the witness attends, that the witness shall

not be examined, or that he shall be examined in open Court. It can always restrain the abuse of the power to summon witnesses.

But was there any such abuse here? The mortgagee's accounts have to be vouched and the mortgagor can surcharge, if necessary, and he then will have a right to go into evidence. But is there any harm in doing so beforehand if it is to be done eventually? I am not satisfied that any money will be wasted by examining the witness at once. I am therefore of opinion that this case is not open to the objection on the ground of irregularity or of oppression. The appeal must be dismissed.

COTTON, L.J.:—

I am of the same opinion. It is remarkable that at first the only application was to discharge the service of the subpœna for irregularity. On that point I cannot add anything to what has been said by the Master of the Rolls. I think that the subpœna was issued in accordance with the practice. As to the second point, whether there has been an abuse of the right to summon the witness; I quite agree that the Court ought to see that the parties do not abuse their privilege, but I am unable to see that this subpœna was open to any such objection. The witness had acted as solicitor on behalf of both mortgagor and mortgagee, and the mortgagor wished to put in the accounts rendered to him by his solicitor in another proceeding. The Chief Clerk rightly rejected it, and then the mortgagor desires to prove the items by calling the solicitor as a witness. That being so, I think he is calling the solicitor for a legitimate purpose, and there is nothing to induce me to suppose that this course will cause any additional expense, or be used for any improper purposes.

Solicitors: *A. Cheese*, agents for *Curteis, East Stonehouse; Gush & Phillips*, agents for *Pearse, Plymouth.*

M. W.

C. A. 1882 Nov. 17.

Ex parte GEISEL.
In re STANGER.

Adjudication of Bankruptcy—Application to annul—Limit of Time—Act of Bankruptcy—Departing from Dwelling-house—Onus of Proof—Annulling Adjudication—Protection of Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), *ss.* 6, 10, 71—*Bankruptcy Rules*, 1870, *r.* 143.

24 Ch D 492

In a proper case an adjudication of bankruptcy may be annulled upon an application made after the expiration of the time limited for appealing from it.

Sect. 10 of the *Bankruptcy Act*, 1869, has no application to an appeal from an adjudication, or to an application to annul it.

Ex parte Brown (1) explained.

Ex parte Johnson (2) distinguished.

A petitioning creditor, who alleges that his debtor has committed an act of bankruptcy, by departing from his dwelling-house with intend to defeat and delay his creditors, is bound to shew that the debtor is alive and in some other place.

An order was made by the Court of Appeal to annul an adjudication of bankruptcy, on the ground that the debtor must be presumed to have been dead when it was made. Probate had been granted of a will executed by the debtor:—

Held, that the costs and charges of the trustee properly incurred, and the costs of all parties of the application to annul and of the appeal, must be paid out of the estate, and that the executors must confirm all acts properly done by the trustee in the bankruptcy.

THIS was an appeal from the refusal of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy, to annul an adjudication of bankruptcy which had been made on the 1st of June, 1882, against *Urban Napoleon Stanger*.

The bankruptcy petition was presented on the 23rd of May, 1882, and it alleged as an act of bankruptcy that the bankrupt, with intent to defeat and delay his creditors, had absented himself from his dwelling-house since the 27th of November, 1881.

On the 18th of July, 1882, upon an *ex parte* application to the Probate Division, probate was granted of a will executed by the bankrupt, the Court finding on the evidence that he must be

(1) Law Rep. 9 Ch. 304. (2) 12 Ch. D. 905.

presumed to have been dead on and since the 12th of November, 1881.

The executors then applied to the Court of Bankruptcy to annul the adjudication, on the ground that the bankrupt was dead at the time when it was made, if not before. The Registrar refused the application.

The executors appealed.

Cooper-Willis, Q.C., and *Brough*, for the Appellants :—

The proper inference from the evidence is that the debtor was dead long before the adjudication was made.

Winslow, Q.C., and *Wyatt Hart*, for the Trustee :—

The Court will not rehear a case after the expiration of the twenty-one days limited for appealing from the order made: *Ex parte Brown* (1).

[JESSEL, M.R. :—The Court did not then lay down any absolute limit of time as to rehearing; they only said that as a general rule they would adhere to the limit of twenty-one days fixed for appealing.]

After the expiration of the twenty-one days limited for appealing from it an order of adjudication is good against all the world: *Bankruptcy Act*, 1869, sect. 10 (2); *Ex parte Learoyd* (3); *Ex parte Johnson* (4).

[JESSEL, M.R. :—The argument as to the effect of sect. 10 would equally prove that an adjudication must be good against all the world, even if it is reversed on an appeal within twenty-one days. Sect. 10 cannot apply to an order which is discharged.

COTTON, L.J. :—Does sect. 10 apply at all to an application to annul an adjudication? Does it apply to anything but legal proceedings taken by or against a trustee in bankruptcy?

(1) Law Rep. 9 Ch. 304.

(2) Sect. 10 provides that a copy of the *London Gazette* containing an order of adjudication "shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt, and of the date of the adjudication."

(3) 10 Ch. D. 3.

(4) 12 Ch. D. 905.

C. A.
1882
Ex parte GEISEL.
In re STANGER.

JESSEL, M.R., referred to *Ex parte Ashworth* (1).

COTTON, L.J., referred to *Ex parte Tucker* (2).]

When there is evidence that a trader has not been at his place of business for months, that *primâ facie* shews that he intended the necessary consequence of his act, to defeat and delay his creditors. The probate is not evidence in this Court that the debtor is dead; and certainly not that he died on any particular day. It must be proved by evidence in this Court that he was dead when the alleged act of bankruptcy was committed, or at any rate when the adjudication was made.

[JESSEL, M.R.:—If you say that a man has left his dwelling-house you must shew that he is somewhere.]

It is the duty of the trustee to support the adjudication, and if the adjudication is annulled, he ought to be protected with regard to what he has properly done in administering the estate.

Lynch, for the petitioning creditor:—

It is the duty of the executors to shew that the debtor was dead.

Willis:—We do not object to the trustee being allowed all expenses properly incurred by him.

JESSEL, M.R.:—

This is a very singular case, but it appears to me that the person who says that another has committed an act of bankruptcy is bound to prove it affirmatively. Now in this case the petitioning creditor alleged that *Stanger* had absented himself for a long period from his place of business, with the view of defeating and delaying his creditors. Has he proved that? In my opinion he has not. I quite agree that, in an ordinary case, the fact of a man not being present in his dwelling-house is pretty good proof of his having gone away, and the fact of his having gone away, leaving his debts unprovided for, is pretty good proof that he intends to defeat and delay his creditors within the meaning of the *Bankruptcy Act*. But the present is not an ordinary case,

(1) Law Rep. 18 Eq. 705, 713.

(2) 12 Ch. D. 308.

and to apply those rules of evidence, or rather those inferences of fact, to such a case would, in my opinion, be to misapply them. When I come to consider the facts, I am not satisfied that the man is alive. It is not necessary for me to be satisfied that he is dead, because, in order to be absent, he must be alive, and, if I am not satisfied that he is alive (notwithstanding the ordinary presumption in favour of life), then I cannot be satisfied that he has committed an act of bankruptcy, and therefore I must hold that there ought to be no adjudication.

[His Lordship then referred to the evidence, and said that he thought it was not satisfactorily proved that *Stanger* was insolvent. On the contrary, on the evidence, he thought that he was quite solvent. Therefore it was not likely that he went away to avoid his creditors. Nor was any motive assigned for his disappearance. No doubt people did sometimes disappear without any assignable motive for their disappearance, but the circumstances in evidence made it probable that *Stanger* was no longer alive. His Lordship continued:—] It is, however quite sufficient for me to say that I think the petitioning creditor did not make out his case.

That being so, I think that the bankruptcy ought to be annulled, but of course proper protection must be given to the trustee as to what he has done *bonâ fide* in the administration of the affairs of the bankrupt.

COTTON, L.J.:—

I wish to add something upon the preliminary question which has been argued, whether we have power to hear the appeal. That argument was really put on two distinct grounds. It was first put on the 10th section.

Now, if we were to hold that that section prevents the present application, it would lead to the absurd conclusion which has been pointed out by the Master of the Rolls. Upon the true construction of that section it does not, in my opinion, in any way apply to proceedings taken for the purpose of questioning or annulling an adjudication. It means that the production of the advertisement, in any legal proceedings depending on the title of the trustee or on the validity of the bankruptcy, shall be

C. A.
1882
Ex parte GEISEL.
In re STANGER.
Cotton, L.J.

considered as conclusive evidence that the bankrupt was duly adjudged a bankrupt and of the date of the adjudication. But here the Appellants are questioning the order of adjudication. No doubt, the twenty-one days have expired within which, under ordinary circumstances, the adjudication might have been questioned by means of an appeal; but the Court has undoubtedly power, if it thinks the parties have made a proper case, to allow the question to be raised after that time. That was expressly decided by the Court of Appeal in *Ex parte Tucker* (1). Really the only question is whether the executors have come under such circumstances that they ought to be allowed to question the adjudication. They applied not very long after the order of adjudication, and certainly not very long after they obtained the probate, and therefore, in my opinion, the 10th section having no bearing on the question, we are at liberty to hold in the present case that the question can properly be raised.

As regards the other point, all I need say is this, that on the evidence before the Court it is clear that since the 12th of November, 1881, the alleged bankrupt has not been in his house. To my mind, the proper presumption is, not that he has been absenting himself, not that he was a man capable of going away, but that, even if he was alive in November, 1881, he was not alive at the date of the presentation of the petition.

SIR JAMES HANNEN :—

The question is whether the proper inference to be drawn from the facts is that this missing man has run away from his creditors or that he is dead. I came to the conclusion on the application for probate that he was dead. I had nothing then to do with the question whether he had run away from his creditors, that was not the point then before me. But at the same time if I had thought that the evidence led to the conclusion that he had run away from his creditors, of course I should not have found that he was dead. [His Lordship referred to the evidence, and added :—] It appears to me that the proper conclusion is that he was dead when the adjudication was made, not that he had committed an act of bankruptcy.

(1) 12 Ch. D. 308.

C. A.
1882
Ex parte GEISEL.
In re STANGER.

Cooper Willis:—Your Lordships will allow the appeal and annul the adjudication, and direct that the costs and charges which the trustee has properly incurred, and the costs of all parties of and incident to the application to annul, and of the appeal be paid or allowed by the executors out of the estate, and that the executors do confirm all acts properly done by the trustee in the matter of the bankruptcy.

JESSEL, M.R.:—Yes. The adjudication will be annulled. The whole of the fund now in the hands of the trustee must be paid into Court within a week, and then the costs and charges will be paid out of it.

Solicitor for Appellants: *W. G. Morris.*
Solicitors for Trustee: *Hatchett-Jones & Letcher.*
Solicitors for Petitioning Creditor: *Palmer & Smith.*

W. L. C.

WILLIAMS *v.* BRISCO.

C. A.
1882
KAY, J.
Feb. 21.
C. A.
Nov. 21.

[1880 W. 361.]

Specific Performance — Condition Precedent — Agreement to grant Lease to Nominee of Plaintiff—No Nominee appointed—Agreement by Letter—Statute of Frauds.

A lessee wrote to his lessor offering to surrender his lease and to take a fresh lease for twenty-one years to a nominee, or to a company which he intended to form, at an increased rent, but otherwise on the same terms as the existing lease; and by a subsequent letter offered to instruct his solicitor to prepare a draft lease. The lessor telegraphed to him in reply to get the lease prepared. Afterwards correspondence took place between the solicitors as to the form of the lease, and the lessee's solicitor prepared a formal agreement. Differences having arisen, the lessor refused to grant the lease, and the lessee brought an action for specific performance of the agreement to grant a lease and for damages. No company had been formed and no nominee appointed by the Plaintiff before the trial of the action:—

Held (reversing the decision of *Kay*, J.), that assuming that there was a binding agreement for a lease, the formation of a company or appointment of a nominee was a condition precedent, and that the Plaintiff could not

C. A. 1882 WILLIAMS v. BRISCO.

maintain an action for specific performance of the contract, as he had not performed the condition.

But, *held*, also, on the construction of the correspondence, that there was no binding agreement between the parties, and therefore the action entirely failed.

THE Plaintiff, *Griffith Williams*, claimed by his statement of claim specific performance of an agreement that the Plaintiff should surrender a certain indenture of lease to the Defendant, *Wastel Brisco*, and that the Defendant, in consideration of an advanced rent of £80, should accept such surrender and grant a fresh lease to the nominee or nominees of the Plaintiff at the said advanced rent but otherwise on the terms of the existing lease. The Plaintiff also asked in the alternative for damages for breach of the agreement.

The Defendant put in a defence in which he stated that he was only tenant for life of the premises, and denied that any agreement had ever been concluded; and pleaded the *Statute of Frauds*. He also denied that the Plaintiff was ever ready and willing to perform the agreement on his part.

The Plaintiff was a timber merchant at *Aberystwyth*. The premises at which the business was carried on were held under a lease granted on the 3rd of March, 1876, by the Defendant's father for a term of twenty-one years at the rent of £50. The Plaintiff proposed to form a limited company for carrying on the business and to surrender the old lease and procure a fresh lease to be granted to the new company.

No formal agreement had been drawn up, but the Plaintiff sought to prove the agreement by a series of letters between the parties. The principal of these are as follows:—

February 18th, 1880. From the Plaintiff to the Defendant.

"I hereby offer to surrender the present lease of my premises at *Newtown* upon your granting to the limited company proposed to be formed to carry on my business there, or to my nominees, a new lease of the premises for a term of twenty-one years from Lady Day next for a premium of £50, but at the same rent and under the same covenants as are contained in my present lease, I guaranteeing the payment of rent and performance of covenants."

This offer was refused by the Defendant, who proposed a rent

of £100. The Plaintiff then proposed a rent of £75, which was also refused.

On the 1st of April, 1880, the Defendant wrote to the Plaintiff, in answer to a letter which was not produced:—

"Your few lines just received. If an £80 rental will suit your views the matter may be settled at once."

On the 3rd of April, 1880, the Plaintiff replied as follows:—

"In reply to your favour of the 1st instant, although the rent of £80 is really a very high one, I will surrender the existing lease as required on your granting a new lease at £80 a year to my nominee on the same terms in every respect as the present one, and I hope something will now be done at once."

On the 9th of June, 1880, the Plaintiff wrote complaining of the delay, and adding, "Perhaps I had better instruct my solicitors to prepare a draft lease and send it on to your solicitors for approval, as I am now anxious to bring the matter to a close as soon as possible."

On the 25th of June, 1880, the Defendant sent back the following telegram:—

"Get the lease prepared for twenty-one years, and I shall bear half the expense."

Then followed a correspondence between the solicitors of the parties as to the form of the proposed lease, and on the 28th of June, 1880, the Plaintiff's solicitors proposed the following agreement as carrying out the intention of the parties.

"Mr. *Brisco* agrees to grant to Messrs. *Williams & Son*, or their nominees, when applied for, a new lease of the premises now held by Messrs. *Williams & Son* of Mr. *Brisco*, situate, &c., for a term of twenty-one years at a rent of £80 per annum, and subject to the same covenants as in present lease, which is to be thereupon surrendered, each party to bear one-half of the expenses of carrying out the agreements. Messrs. *Williams & Son* to guarantee the payment of rent and performance of covenants of new lease."

The Plaintiff's solicitor further wrote on the 30th June, 1880, asking that the agreement might be made out in the name of *G. Williams* instead of *Williams & Son*, and adding, "The provision for determining the new lease at the expiration of seven or

C. A. 1882 WILLIAMS v. BRISCO.

fourteen years at the lessee's option to be inserted in the new lease, as in the present one. We should be glad to know if you have prepared agreement."

No agreement was, however, signed; and after some further correspondence the Defendant refused, through his solicitor, to grant a new lease to the nominees of the Plaintiff.

The Plaintiff then brought the present action. The action was heard before Mr. Justice *Kay* on the 21st of February, 1882.

Higgins, Q.C., and *Fellows*, for the Plaintiff:—

Crossley, Q.C., and *Laing*, for the Defendant:—

KAY, J., after reading the correspondence down to and including the telegram of the 25th of June, 1880, said:—

Looking at all that correspondence I can have no reasonable doubt the parties were then at one, and had agreed to a lease of twenty-one years from Lady Day mentioned in the letter of the 18th of February, at a rent of £80 for the premises comprised in the existing lease. It seems to me that that is the result of this correspondence; and that a telegram may be taken to be an acceptance in writing, is decided by the case of *Godwin* v. *Francis* (1).

But I must not stop there, following not only what Lord *Cairns* expressed, but what he actually did in the case of *Hussey* v. *Horne-Payne* (2). I must look through the rest of the correspondence to see whether or not these terms, which I consider, were concluded at that point, were afterwards in any way modified, or the agreement which I think up to that point is established, was put an end to. The correspondence goes on thus: [His Lordship then considered the subsequent correspondence between the solicitors of the parties, and continued:—] Examining the correspondence in order to make out what the real meaning of it is, I cannot avoid coming to the conclusion that there was a definite contract between the parties, that each of them thoroughly agreed that a lease should be accepted and granted; that the former lease was to be surrendered, and the new lease was to be

(1) Law Rep. 5 C. P. 295. (2) 4 App. Cas. 311.

for twenty-one years from Lady Day, 1880, subject to the agreed rent and upon the terms in all other respects of the former lease, but to be granted to a company which was to be formed, Mr. *Williams* guaranteeing payment of rent and performance of covenants, in fact, joining in the lease for the purpose of giving the guarantee.

Now that being so, I cannot come to any conclusion that this attempt to have the contract put into a more formal shape in any way destroyed the contract that had been entered into. Therefore I hold that there was a contract sufficiently clear and definite to enable this Court to decree specific performance.

But several other objections have been raised. Although it is proved the company was on the eve of formation, it has not been formed, and at this moment there is no such company. That is an objection very well worth considering, but the Court has ample power to prevent the Defendant being injured by that state of things, because I am at liberty to put the Plaintiff on an undertaking that the company which was contemplated, and to which Mr. *Brisco* agreed to grant the lease, shall be completely formed in a definite time; and if it is not, I retain the power of dismissing this action with costs. I am told that an undertaking will be given, and that the company will be completely and properly formed within a month from this time; and on that undertaking I think I am bound to overrule that objection, and not consider it as an obstacle to my granting specific performance.

[His Lordship then considered the objections which had been made on the ground that the terms of the new lease did not sufficiently appear in the letters, and expressed his opinion that taking the whole of the correspondence together the terms of the new lease could be clearly made out. His Lordship then continued:—]

Therefore, upon the whole, I think I am bound to declare that in this case there is on the correspondence a contract by Mr. *Brisco* to grant a lease of the premises comprised in the then existing lease for twenty-one years commencing from Lady Day, 1880; that existing lease to be surrendered, and the rent to be £80 a year instead of £50; the lease to be granted to the

C. A. 1882 WILLIAMS v. BRISCO. C. A.

company within a month from this date, and within that time the Plaintiff to guarantee the payment of rent and performance of covenants.

C. M.

From this judgment the Defendant appealed.

The appeal came on to be heard on the 21st of November, 1882.

Crossley, Q.C., and *Laing*, for the Appellant:—

Where it is attempted to make out an agreement by letters it is incumbent on the Plaintiff to shew distinctly that all the terms were defined, and that they were all agreed to at one time by both parties. The Plaintiff has not shewn this in the present case. The date of the commencement of the term had not been mentioned before the telegram of the 25th of June, 1880, on which the Plaintiff relies, was sent. The whole correspondence was only negociation: *Marshall* v. *Berridge* (1); *Hyde* v. *Wrench* (2). The subsequent letters which passed between the solicitors shew conclusively that the parties did not consider themselves bound by what had taken place. The whole correspondence must be looked at, for subsequent letters often throw light upon the intention of the parties as expressed in previous letters: *Hussey* v. *Horne-Payne* (3).

But even if there was a concluded agreement the Plaintiff cannot maintain this action. The lease was to be granted to a nominee of the Plaintiff or to a company to be formed, but no nominee has been appointed and no company has been formed. The Plaintiff ought to have been in a position to aver that a company had been formed and that they were ready to accept the lease.

Higgins, Q.C., and *Fellows*, for the Plaintiff:—

There was a concluded agreement when the telegram of the 25th of June, 1880, was sent. The term is sufficiently indicated. It is to be for twenty-one years commencing from Lady Day, 1880. The subsequent letters between the solicitors could not

(1) 19 Ch. D. 233. (2) 3 Beav. 334.
(3) 4 App. Cas. 311.

affect this agreement. They were imperfectly informed of what had really taken place.

With respect to the objection that a company has not been already formed, we are ready and able to form one before the lease is granted. It is sufficient if we are ready to perform the contract when the lease is tendered. In an ordinary suit for specific performance between vendor and purchaser it is sufficient if the vendor shews a good title when the inquiry as to title is made.

JESSEL, M.R. :—

This appeal from a decision of Mr. Justice *Kay* raises two points. The first is whether, supposing there were a binding contract to grant a lease of the property in question, there could be a decree for specific performance of it to a non-existing company, a point which, so far as I know, is entirely new. The other question is whether there was any binding contract at all which could sustain the action either for specific performance or damages.

As to the first point, I think that such a decree could not be supported. The contract for which specific performance is sought was of this kind, it was to grant a lease to the nominees of the Plaintiff. The lease cannot be granted till he has appointed a nominee, and until the nominee has accepted the proposed lease. Such a contract is common enough in the case of building leases between the freeholder and the builder. The nominee is generally the purchaser of the houses and the lease is granted to him, but the contract can never be enforced till the nominee is appointed. In the present case the lease was to be granted to a limited company; and not only at the time when the action was brought, but at the time of the trial there was no such company formed. Mr. Justice *Kay* took an undertaking from the Plaintiff that he would establish such a company; but suppose he did not succeed in doing so, then the contract could not be performed and the Defendant might indeed put the Plaintiff into prison, but he could not get the decree worked out. I think that if the learned Judge had considered this difficulty he would not have made the decree in that form. Therefore the Plaintiff cannot maintain this decree for specific performance.

C. A. 1882 WILLIAMS v. BRISCO. Jessel, M.R.

But that does not dispose of the whole case. Suppose the Defendant had absolutely refused to perform the contract, he would have waived his right to insist upon the performance by the Plaintiff of the condition precedent, and laid himself open to an action for damages. The Plaintiff may say in such a case I am not to be put to the trouble of doing acts which will be useless by reason of the Defendant's refusal to perform the contract. Assuming that to be the case, the Plaintiff might maintain this action for damages although he could not get specific performance. It is therefore necessary to see if there was any contract or not. I must say that it is near the line, but on careful consideration of the correspondence I have come to the conclusion that the letters amount only to negotiation, and did not constitute a contract. In the first place I do not consider that *Hussey* v. *Horne-Payne* (1) laid down any new law. It was always held that you might look at the whole of the correspondence, just as in construing a clause of a deed you let in the whole deed, and sometimes also contemporaneous deeds. If in all the letters taken together you see that the parties did not intend to make a contract, even though on two or three letters there appeared to be a contract, you would hold that on the whole correspondence there was none.

[His Lordship then considered the correspondence and concluded as follows:—]

On the whole I think the result is that there was no concluded agreement. Both parties, in my opinion, intended that there should be a clear and formal agreement drawn up. It is for the Plaintiff to convince the Court that there is a binding agreement, and, in my opinion, he has not done so in this case. The appeal must be allowed and the action dismissed with costs.

COTTON, L.J.:—

There are two questions for decision in this case. First whether the decree for specific performance is right; and, secondly, whether there was an agreement between the parties. On the first point, the objection to this judgment is that at the time when the action was brought the Plaintiff had not provided a nominee,

(1) 4 App. Cas. 311.

which was a condition precedent to the lease being granted. No doubt in actions for specific performance which arise between vendor and purchaser there is an inquiry as to the title of the vendor after a decree has been made, and if no title is shewn the action is then dismissed. But the regular form of proceeding in that kind of action is by inquiry, and it stands on a different footing from actions like this, where the Plaintiff must shew that he has done everything that he is required to do before the action is brought. And, in my opinion, where there is a contract to grant a lease to a nominee of the Plaintiff, the Plaintiff must aver in his claim that he has appointed a nominee, and that the nominee is ready and willing to accept the lease.

But that is not enough to dispose of this action, for if the Defendant had distinctly refused to perform the contract, that would have dispensed with the necessity for the Plaintiff to perform the conditions, and would have entitled the Plaintiff to claim damages. Therefore we must go into the question whether there was an agreement or not. I agree that this is a very difficult question, but I am unable to see any letter from the Defendant which amounts to an acceptance of the terms offered by the Plaintiff.

[His Lordship then reviewed the correspondence and concluded by saying that in his opinion there was no agreement which could form the ground of an action.]

BOWEN, L.J.:—

I entirely agree.

Solicitors: *Griffith Jones; Biale.*

M. W.

C. A.
1882
C. J. B.
July 10.
C. A.
Nov. 23.

Ex parte BATH. *In re* PHILLIPS.

Proof in Bankruptcy—Interest—Mortgage to Building Society—Principal and Interest payable by Monthly Instalments—Bankruptcy Rules, 1870, *r.* 77.

A mortgage to a building society provided that the loan, with a premium and interest on the advance, should be paid in equal monthly instalments during a term of twelve years, and that each monthly instalment, when paid, should be applied (1) in payment of the interest due at the time of payment, (2) in payment of the premium till the whole should be discharged, and (3) in payment of the principal. Two years after the execution of the mortgage the mortgagor filed a liquidation petition, and the society claimed to prove in the liquidation for the total amount of the monthly instalments which remained due under the deed, less the amount at which they valued their security :—

Held, that, as to so much of the sum claimed as represented interest payable subsequently to the filing of the liquidation petition, the proof must be rejected.

Decision of *Bacon*, C.J., reversed.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

H. J. Phillips, an auctioneer and builder at *Tottenham*, having filed a liquidation petition in the *Edmonton* County Court, his creditors on the 16th of February, 1881, resolved on a liquidation by arrangement, and appointed a trustee.

On the 30th of May, 1881, the *Liberator Permanent Benefit Building Society* tendered to the trustee a proof for the sum of £6367 16*s.* 9*d.*, which they alleged to be due to them by *Phillips*. The affidavit of proof, made by a clerk of the society, stated that the sum of £6367 16*s.* 9*d.* was made up of £5891 19*s.* 7*d.* due from *Phillips* to the society for arrears of repayments and fines under covenants contained in three indentures of mortgage executed by him to the society and dated respectively the 8th of February, and the 29th of March, 1879, and the 8th of March, 1880; the sum of £9 for costs of an action of ejectment; several sums of £24, £7 3*s.* 2*d.*, £12 12*s.*, and £10 10*s.* paid by the society for *Phillips*; and the sum of £412 12*s.* paid by the society to a builder for completing and repairing certain property

of *Phillips*. The affidavit stated that the society estimated the value of their security at the sum of £4422 7*s*. 4*d*., and that they were ready and willing to give up their security for the benefit of the creditors of *Phillips* on payment to them of the sum of £4422 7*s*. 4*d*.

The mortgage of the 29th of March, 1879, was made between *Phillips*, described as a member of the society, of the one part, and the society of the other part. It contained a recital that the mortgagor, being the holder of forty shares in the society, had applied for the advance of £1200, and had agreed, and did thereby agree with the society to pay a sum of £144 as and by way of premium or commission for such advance, and to pay such sums of £1200 and £144 (making together the sum of £1344), together with interest from the date of the deed in respect thereof, at the rate of 5 per cent. per annum, on so much of the said sum of £1344 as should from time to time remain unpaid, by monthly repayments of £12 12*s*. in each month throughout the term of twelve years, and further, that every such monthly repayment should when made be applied as follows, viz., firstly, in or towards satisfaction of so much interest as should be due at the time of such repayment being made; secondly, in or towards payment of the premium of £144, until the whole thereof should be so discharged; and, lastly, toward payment of the principal sum of £1200 agreed to be advanced; and in case default should be made in any monthly payment also a fine of 4*d*. per month per share, for every month during which or during any part of which any such monthly repayment, or the fines accrued in respect of any default, should remain unpaid, such repayments and fines to be secured in manner thereinafter appearing. And it was witnessed that, in consideration of the sum of £1200 to the mortgagor paid by the society, the mortgagor did thereby covenant with the society that he would pay to the society on the first Monday in the month of April then next, and on every first Monday (except when such Monday should happen to be a statute holiday, and then on the following day) in each successive month during the said term of twelve years the sum of £12 12*s*. "being the monthly repayment agreed upon as aforesaid in respect of the said advance of £1200 and

C. A. 1882 *Ex parte* BATH. *In re* PHILLIPS.

the said premium of £144, and interest as aforesaid. And also, in case default shall be made in any such monthly payment at the place and time aforesaid, then a fine of 4*d.* per share (in respect of each of the said forty shares) for every month during which, or during any part of which, any such monthly repayment, or the fine or fines thereon, shall remain unpaid, and will also duly and punctually pay to the said society all subscriptions and other moneys which, according to the rules for the time being of the said society, shall from time to time become payable in respect of the said forty shares," and also would duly observe and perform all the rules for the time being of the said society which ought on the part of the mortgagor to be observed and performed. And it was further witnessed that, for the consideration aforesaid, the mortgagor did demise unto the society certain tenements and hereditaments described in a schedule, to hold the same to the society for the residue of a certain term of ninety-nine years (except the last three days thereof), subject to a proviso for vacating the deed if the mortgagor should pay to the society all the repayments, subscriptions, and other moneys (if any) which, according to the rules for the time being of the society, should from time to time become payable in respect of the forty shares, and should observe and perform all the same rules and the covenants by the mortgagor and the provisions in the deed contained.

The other two mortgages were in a similar form.

The trustee in the liquidation on the 24th of February, 1882, gave notice to the society that he rejected so much of the proof of debt alleged to be due for arrears of repayments and fines due from *Phillips* to the society as was claimed in respect of, or comprised, the interest payable under the mortgages referred to in the proof subsequent to the date of the institution of the liquidation proceedings, "on the ground that such interest accruing due after the date of the institution of these proceedings was not a debt due at such date, and is not capable of being claimed as a principal debt." The Judge of the County Court affirmed the trustee's rejection, and ordered an inquiry to be made as to the amount due to the society for principal, premium, and interest at 5 per cent. per annum upon the three mortgages up to the date

of the filing of the liquidation petition, after giving credit for all sums paid by the debtor in reduction thereof.

The society appealed to the Chief Judge. The appeal was heard on the 10th of July, 1882.

Winslow, Q.C., and *H. Reed*, for the society.

Counsel was instructed for the trustee, but, owing to some accident, he was not present when the appeal was called on, and it was disposed of in his absence.

BACON, C.J., reversed the decision, and ordered the proof to be admitted for the full amount claimed.

The trustee appealed. The appeal was heard on the 23rd of November, 1882. C. A.

F. Turner, for the trustee :—

A proof is never allowed for interest accruing due after the filing of the petition, except in the event of there being a surplus. The Court looks at the substance of the transaction, and if it sees that the claim is really for interest after the filing of the petition, it will not admit it.

[COTTON, L.J., referred to *Ex parte Robinson* (1).]

In the present case it is expressly provided that the monthly instalments are to be applied first in the payment of interest.

Winslow, Q.C., and *H. Reed*, for the society :—

If a separate promissory note had been given for each monthly instalment it would be clear that the notes could all be proved, and it would have made no difference if the notes had contained a statement that the amount included principal and interest. An absolute covenant to pay a gross sum of money, which includes principal and interest, creates a debt which is provable in bankruptcy. If the Appellant is right, the Court of Bankruptcy must inquire into every covenant or promise by a bankrupt to pay a gross sum of money in order to ascertain whether the sum includes any interest.

(1) 31 L. J. (Bkcy.) 12.

C. A. 1882 *Ex parte* BATH. *In re* PHILLIPS.

[JESSEL, M.R.:—Only in the case of a loan.]

The proof ought to be admitted for the whole amount, though it is not presently payable, and then, under r. 77 of the *Bankruptcy Rules*, 1870, when a dividend is declared, there will be a rebate of interest for the period between the declaration of the dividend and the time when the debt would have become payable.

JESSEL, M.R.:—

It is very unfortunate that the Chief Judge did not give Mr. *Turner* an opportunity of being heard; if he had, I think we should never have heard of this appeal. In my opinion the point is one of the greatest simplicity. The mortgage deed provides for the payment of a gross sum of principal and interest by certain monthly instalments. There is a recital of an agreement that the monthly instalments when paid shall be applied, (1) in paying interest, (2) in paying the premiums, (3) in repaying the principal, and the mortgagor covenants to pay the monthly instalments accordingly. So that, on the face of the instrument itself, it appears that the monthly instalments are made up of interest, premium, and principal. That being so, it is well settled that a creditor cannot prove in bankruptcy for interest accruing due after the filing of the petition, unless there is a surplus. But it is said that the circumstance that the principal and interest are lumped together in one sum makes a difference, though it is stated of what that lump sum is composed. I must confess that I cannot follow the argument. The Court of Bankruptcy is a Court of Equity, and has regard to the substance of a transaction. I think it can make no difference whether the arithmetic is or is not done on the face of the instrument. For the purposes of administration in bankruptcy these two covenants appear to me identical—a covenant to pay £1000 together with £100 for interest, and a covenant to pay £1100 consisting of principal and interest. I think the decision of the County Court Judge was right, and that the proof ought not to be admitted in respect of interest accruing due after the filing of the petition.

COTTON, L.J.:—

I am of the same opinion. It is a well-established rule in bankruptcy that there can be no proof for interest accruing due after the filing of the petition, unless the estate is more than sufficient to pay the creditors in full. The only question, therefore, is whether this sum which it is sought to prove is in part composed of interest accruing subsequent to the filing of the petition, and the very form of the mortgage deed shews that it is. It is said that the transaction is equivalent to the purchase of an annuity by the society for the term of twelve years. Even if it was, and it appeared that the annuity was in part composed of interest, in my opinion the proof for that part could not be admitted. But here the very form of the deed shews that each monthly instalment is in part composed of interest. It clearly shews that, though the aggregate amount of the payment for each month is fixed, that payment is partly composed of interest on the sum advanced. In my opinion the order of the County Court Judge was right.

BOWEN, L.J.:—

I entirely agree with what has been said by the Master of the Rolls and Lord Justice *Cotton*.

Appeal allowed, with costs, and order of County Court restored.

Solicitor for Trustee: *H. Rumney.*
Solicitor for Building Society: *H. G. Wright.*

W. L. C.

C. A.
1882
Nov. 29.

In re ORR EWING.
ORR EWING *v.* ORR EWING.

[1880 E. 31.]

Administration—Testator domiciled in Scotland—Scotch Assets.

A gentleman resident and domiciled in *Scotland* made a will in Scotch form, appointing six trustees, two of whom were resident in *England*, one being a Scotch member of Parliament was in *England* during the session, and the other three were resident in *Scotland*. The testator had a large property in *Scotland* and a comparatively trifling amount of personal estate in *England*. The trustees proved the will in *Scotland*, and then constituted themselves personal representatives in *England*, and removed all the English personalty to *Scotland*. A person resident in *England*, who was entitled to a share of a large legacy and also of the residue, brought an action here to administer the estate. Three of the trustees were served in *England* and the other three in *Scotland* under the usual order. They entered an appearance without protest, and took no steps to discharge the order. The Plaintiff moved for judgment for administration of the whole estate, both Scotch and English. No action was pending in *Scotland* in which the estate could be administered:—

Held, by *Manisty*, J., that an order for administration ought not to be made:

Held, on appeal, that an order must be made for administration of the whole estate of the testator, for that although if the Scotch executors had appeared conditionally and applied to discharge the order for service in *Scotland* the Court would have entered into the question whether it was convenient to have the estate administered in *England*, the Court at the trial had no discretion, but was bound to give the Plaintiff a decree.

JOHN ORR EWING, a Scotchman resident and domiciled in *Scotland*, and carrying on there an extensive business in partnership, made a will in Scotch form, dated the 17th of November, 1873, by which he disposed of his property in favour of the six Defendants (three of whom were his brothers) as trustees. Among other dispositions he directed his trustees to hold and apply £60,000 for the benefit of the children of his brother *James Ewing* (one of the trustees) in manner therein mentioned, and directed the trustees to apply the residue of his estate for the benefit of the children of *James Ewing* in manner therein mentioned.

The testator died on the 15th of April, 1878, and the six

trustees proved the will in *Scotland* in Scotch form, and on the 25th of May, 1878, caused the Scotch probate to be sealed with the seal of the principal registry of the Probate Division in *England*, and so became personal representatives in *England* of the testator.

The personal estate of the testator at his death, as appeared from an inventory filed by the executors in *Scotland*, was of the value of £460,549 10*s.* 4*d.*, of which £435,313 17*s.* 10*d.* was in *Scotland*, and £25,235 12*s.* 6*d.* in *England*.

The testator's brother *James Ewing* had at the death of the testator six children, one of whom, *William Ewing*, had subsequently died, leaving a will of which two of the Defendants were the executors, but it had not been proved in *England*. This action was commenced by the three youngest of these children, who were infants, by *G. W. Hope*, their next friend, and *G. W. Hope*, who was a legatee of £10,000 under the will of *William Ewing*, as Plaintiffs against the six executors and trustees for the administration of the testator's estate.

At the commencement of the action two of the Defendants were resident in *England*, and another, being a member of Parliament, was in *London* during the session. The other three were resident in *Scotland*. On the 24th of February, 1880, leave was obtained to issue the writ and serve it in *Scotland* on the Defendants who resided there. The writ was issued on the following day, and served on three of the Defendants in *England* and on the other three in *Scotland*. The Defendants in *Scotland* did not enter a conditional appearance, nor take any step to set aside the order for service in *Scotland*, but simply entered an appearance in the ordinary way.

In May, 1880, the Plaintiffs issued a summons for an administration order under Order XV. r. 1. The Defendants objected to an order being made on the ground that it would not be for the benefit of the infant Plaintiffs that the action should go on. The summons came before the Master of the Rolls personally in Chambers, and he adjourned it until the Defendants had applied for a reference whether the suit was for the benefit of the infants. This application was made, and inquiries directed whether the action was properly instituted, and whether it would be fit and

C. A. 1882 *In re* ORR EWING. ORR EWING *v.* ORR EWING.

proper and for the benefit of the infant Plaintiffs that it should be further prosecuted, and if it should appear that it ought to be further prosecuted, then whether Mr. *Hope* was a proper person to be next friend. The Chief Clerk answered the first question in the negative, and the Plaintiffs, except one of the children who had attained twenty-one, moved to vary the certificate. The Master of the Rolls was of opinion that Mr. *Hope* was improperly made a co-Plaintiff, and that two of the three children, one of whom had attained twenty-one, and the other would soon do so, ought to be discharged from being Plaintiffs as they did not wish the suit to proceed, but his Lordship considered it to be for the benefit of the youngest child, who was resident in *England*, that the suit should proceed. The writ was accordingly amended on the 5th of April, 1881, by striking out the names of Mr. *Hope* and the two eldest of the three children as co-Plaintiffs, and on the 9th of April the Plaintiff delivered statement of claim.

The statement of claim alleged that an arrangement come to between the Defendants and the surviving partners of the testator as to the payment out of the value of the testator's share in the partnership business was founded on a wrong principle and was a devastavit, and that it was for the benefit of the infant Plaintiff that he should be made a ward of Court, and that the testator's estate should be administered under the direction of the Court. The Plaintiff claimed an order for administration, a declaration that the Defendants were jointly and severally liable to make good all loss resulting from their alleged improper arrangement with the surviving partners, accounts on the footing of wilful neglect and default, and further relief.

The Defendants by their statement of defence stated that there were then no assets of the testator in *England*, that proceedings had been instituted, and were then pending before the proper Scotch Court against the Defendants in respect of the testator's estate, in which proceedings all questions raised in the present action relating to the administration of the testator's estate could be disposed of by a tribunal conversant with the law of the country according to which those questions must be decided, and that in particular the question as to the mode in which the share and interest of the testator in the partnership business

ought to be paid out would be settled by the Scotch Court. They alleged that it was not for the interest of the Plaintiff that he should be made a ward of Court, and that the action was commenced against the wishes of all persons interested in the testator's estate, except the next friend and the mother of the Plaintiff, who were only interested therein indirectly under the will of *William Ewing*, which had not been proved in *England*, and that it would be a useless expense to administer the estate under the directions of any English Court. They submitted that under the circumstances the Court had no jurisdiction to make any such order as was claimed in the action, and that in any event it had only jurisdiction to make an order for the administration of the English personal estate of the testator.

The proceedings in *Scotland* referred to in the statement of defence were proceedings taken by an adult son of *James Ewing* against the surviving partners in the firm and the trustees, for the purpose of ascertaining the mode in which, according to the terms of the partnership, the share of the testator was to be paid out. These proceedings it appeared would settle all questions between the partners and the testator's estate, but were not adapted to obtaining an administration of the testator's estate.

The action came on for trial on the 17th and 18th of February, 1882, before Mr. Justice *Manisty*, sitting for Mr. Justice *Kay*.

One of the Defendants was examined, and said he did not think that the testator had any debts in *England* at the time of his death, that there were none now, that he did not remember any claims having been sent in in respect of any alleged English debts, and that nothing was owing in *England* to his knowledge.

Mr. Justice *Manisty* considered that the Court had a discretion as to whether an order for administration of the estate should be made in *England*, and held that it was not under the circumstances of this case expedient to order it.

The order made was: "It being proved to the satisfaction of the Court that the testator was at the time of making his will and of his death domiciled in *Scotland*, and that there are no debts of the testator remaining unpaid in *England*, and that the whole of the personal estate of which the testator was possessed in point of fact in *England* has been transferred to *Scotland*, and is

C. A. 1882

In re ORR EWING. ORR EWING *v.* ORR EWING.

now in the hands of the Defendants as his personal representatives in *Scotland;* and the Defendants by their counsel undertaking to pay to the next friend of the Plaintiff the costs of the Plaintiff of this action, including the costs of the proceedings in Chambers, such costs to be taxed by the Taxing Master in case the parties differ, this Court doth order that all further proceedings in this action be stayed, except so far as may be necessary to enforce payment of the said costs."

The Plaintiff appealed, and the appeal was heard on the 29th of November, 1882.

Rigby, Q.C., and *Fellows*, for the Appellant:—

A decree for administration is of course, and it is shewn by *Stirling-Maxwell* v. *Cartwright* (1) that the proper judgment to be given is a judgment for administration of the whole estate. Any objections on the ground that the estate should be administered in *Scotland* come too late at the trial.

Davey, Q.C., *Whitehorne*, Q.C., and *Maclean*, for the Respondents:—

The testator was a domiciled Scotchman. The bulk of his property was in *Scotland*, and he has personal representatives there. There are no debts in *England* to be paid, and we contend that in such circumstances an English representative would do right in handing over the clear surplus to the Scotch representatives, which is in substance what has been done here. The Scotch Courts are the primary *forum* for the administration of the estate, the taking out probate in *England* is merely ancillary to the Scotch administration. The view of Mr. Justice *Manisty* was that though there might be jurisdiction to make an administration order here the Court had a discretion whether or not to make it, and that as the assets were all in *Scotland*, in the hands of the Scotch personal representatives, it was not expedient to administer the estate here. It is most inconvenient that the administration should take place here, the instrument being one in Scotch form containing expressions unintelligible to an English lawyer, and great additional expense is likely to be occasioned if a Scotch

(1) 11 Ch. D. 522.

estate is administered here. In *Enohin* v. *Wylie* (1) Lord *Westbury* says that the administration of the personal estate of a deceased person belongs to the Court of the country where he was domiciled at his death, and that in that case the Russian executors might have insisted that it was the duty of the Court to hand over to them the assets in *England*. In *Eames* v. *Hacon* (2) Mr. Justice *Fry* approved and followed the principles there laid down, and the Court of Appeal (3) expressed no dissent, though they decided the case on another ground. The observations of Lord *Cottenham* in *Preston* v. *Melville* (4) and the case of *Crispin* v. *Doglioni* (5) support our contention. *Meiklan* v. *Campbell* (6) is not against us, for it does not decide that an administration order ought to be made in *England*. The question whether an ancillary representative does not obtain a discharge by payment to the general representative in another country is a question of international law.

[COTTON, L.J.:—But here the representatives are the same, and how can they resist an administration order at the suit of a person claiming under the will? Then, too, how can we take it as established that there are no debts in *England?*

JESSEL, M.R.:—The evidence of the executor on that point is very loose.]

If the jurisdiction is to be founded on the existence of debts in *England* their existence should be proved. The action is not brought for the purpose of clearing the estate of English debts, and their existence is not alleged. The fundamental principle is that the Court of the country of domicil is the primary *forum*. If the testator has assets in another country and the executors apply to the Courts of that country to get them, they must pay the debts in that country, and when that is done nothing more remains than to pay the surplus to the executors in the country of domicil. The exceptions are (1) where the assets here are in danger, in which case, no doubt, the Court will interfere. (2.) A

(1) 10 H. L. C. 1.
(2) 16 Ch. D. 407.
(3) 18 Ch. D. 347.
(4) 8 Cl. & F. 1.
(5) 3 Sw. & T. 96; 32 L. J. (P. & M.) 169.
(6) 24 Beav. 100.

C. A.
1882
In re
ORR EWING.
ORR EWING
v.
ORR EWING.

creditor here may claim to be paid out of the English assets, and the Court will assist him, and so if a person beneficially interested comes to have the fund secured. (3.) Where the foreign representatives are here and submit to the jurisdiction, as in *Enohin* v. *Wylie* (1). In no case but *Stirling-Maxwell* v. *Cartwright* (2) has a claim by the representatives in the country of domicil to have the assets handed over to them been refused. *Pipon* v. *Pipon* (3) shews the principle applicable to such cases. *Preston* v. *Melville* (4) is explained and applied by Lord *St. Leonards* in *Carron Iron Company* v. *Maclaren* (5) and is in our favour.

[JESSEL, M.R. :—The *ratio decidendi* was that there could not be any transfer to *Scotland* till the debts here were paid.]

[*Weatherby* v. *St. Giorgio* (6), *Cook* v. *Gregson* (7), *Innes* v. *Mitchell* (8), and *Wallace* v. *Attorney-General* (9), were also referred to.]

JESSEL, M.R. :—

This is an appeal from the decision of Mr. Justice *Manisty*, and after hearing the arguments addressed to us on the part of the Respondents I am not surprised at that decision, because I think that the learned Judge might fairly arrive at the conclusion that the practice of the Court of Chancery, which in this respect is the same as the Chancery Division, was very different from what it really is. He could not suppose that eminent counsel would address him with long and elaborate arguments which had no bearing on the case which he had to decide, and he would be naturally led to the conclusion that there was some important discretion to be exercised by him. If there had been such a discretion it may well be that he arrived at a correct decision as to the exercise of it. But when we look at the facts there was no discretion to be exercised, and no right, as it appears to me, on the part of the Defendants to resist a judgment for administration.

(1) 10 H. L. C. 1. 8 Jur 685 897
(2) 11 Ch. D. 522.
(3) Ambl. 799.
(4) 8 Cl. & F. 1.
(5) 5 H. L. C. 416, 456.
(6) 2 Hare, 624.
(7) 2 Drew. 286.
(8) 4 Drew. 57; 1 De G. & J. 423.
(9) Law Rep. 1 Ch. 1.

(8) 5 (3 Jur 995 991

C. A.
1882
In re
ORR EWING.
ORR EWING
v.
ORR EWING.
Jessel, M.R.

The facts are of the simplest kind. The Plaintiff is an infant entitled to a substantial share or interest in a legacy of £60,000, and also in the residuary estate. There is no question at all about his title. The property according to the statement of the Defendants, who must approximately know its amount, is nearly half a million after payment of the debts. The Plaintiff is therefore entitled to something very substantial. He brings an action asking for general administration of the estate, on the ground that he is entitled to have his share of the legacy of £60,000, and his share of the residuary property, secured for his benefit as an infant, and that proper provision may be made for his maintenance as a ward of the Court. If the testator had been an English testator, and the executors English executors, a judgment would have been a matter of course. The case would then no doubt have been heard as a short cause, and the ordinary judgment for administration pronounced. But it happens that the testator was a domiciled Scotchman, and that his six executors are also Scotchmen. The Plaintiff was resident in *England*, two out of the six executors were resident in *England*, another of them was resident for a considerable part of the year in *England*, the other three executors resided in *Scotland*, and all the six executors proved the will both in *Scotland* and *England*. It also appears that of the half million or thereabouts of which the testator died possessed, he was at his decease entitled to about £25,000 in *England*, and that the rest of his property was in *Scotland*.

Now for the present purpose it makes no difference whether the testator was a domiciled Scotchman, or a domiciled Irishman, or a domiciled Frenchman. If people in this country are liable to pay or to give security for a large sum of money, it is quite immaterial how the Plaintiff's title arises, provided he has a title to the money in the hands of the Defendants, and the Defendants are within the jurisdiction. Three of the Defendants clearly were within the jurisdiction, and as to them I cannot see a shadow of defence. The other three were served in *Scotland* out of the jurisdiction. They appeared, not under protest, but in the ordinary way, and so submitted to the jurisdiction. It appears to me that from that moment they were in exactly the same position as the other

C. A.
1882
In re ORR EWING.
ORR EWING *v.* ORR EWING.
Jessel, M.R.

three, and that they could no longer object that they were not properly served. Then what did they do after they appeared? They took a proceeding to inquire as to whether the suit as then constituted was for the benefit of the infant. This inquiry it appears ultimately came before me, though I have no recollection of it. In the result it was decided that the suit was a proper suit, and ought to go on. It went on to trial, and then at the trial the executors urged the objection which they have taken by their pleadings that there was no jurisdiction. Now, the jurisdiction of the Court of Chancery, which has been transferred to the High Court, was a personal jurisdiction which can be exercised against a defendant who is within the jurisdiction, or is properly served outside the jurisdiction, and submits to the jurisdiction. Therefore there was clear jurisdiction to pronounce a judgment for administration, and the arguments of the Defendants really amount to nothing.

I will say a word or two about the supposed hardship and the supposed inconvenience. When a defendant in *Scotland* is served out of the jurisdiction he has a right to come to the Court and say, "There are sufficient reasons why I should not be dragged up from *Scotland* to be sued in *England*." The three Defendants who were served in *Scotland* could, therefore, at the proper time have moved (with what prospect of success under the circumstances of this case I do not say) to have the order for service on them discharged, on the ground that they ought to be sued in *Scotland*, the country of their residence, and not in *England*. In considering that motion, it being in the discretion of the Court whether it will order service out of the jurisdiction, the Court would have had regard to the inconvenience that might be suffered by the Defendants from being sued out of their own country, as well as to the other circumstances of the case, but such an application stands on a totally different footing from a resistance to a judgment at the trial.

There is another point to be noticed. I caught during the argument an expression to which I do not assent. *Scotland* was called a foreign country. That, in my opinion, is quite erroneous. Ever since the union of the kingdom of *Great Britain*, *Scotland* has been an integral part of *Great Britain*. It is not a foreign

country. It has a separate legal jurisdiction, but so had several counties in *England*, and one of them still has. At one time *Wales* had a separate jurisdiction, the Court of Great Session. Until far on in this century the county palatine of *Durham* had a separate jurisdiction, and there are still the Duchy and Palatine Courts in *Lancashire*. To talk of *Scotland* as a foreign country, and to say that the same rules apply as if it were a foreign country is, I think, a great error. It is not only an integral part of this kingdom, but the judgment of this Court can be enforced in *Scotland* in the same way that the judgment of a Scotch Court can be enforced in *England*. Moreover, in the case of a foreign country there is a difficulty in ascertaining the foreign law. Where questions of foreign law arise they have to be tried by the sworn or unsworn testimony of advocates and experts as to what the law is. This is very inconvenient, and it would be much more satisfactory to obtain the decision of the Judges of the foreign country on the law of their own country. This, however, in the case of a foreign country cannot be done, but the Legislature has empowered the English Courts where a question of Scotch law arises in the course of English litigation to take the opinion of the Scotch Courts, which they are bound to give, and correlatively has empowered the Scotch Courts to take the opinion of the English Courts on a point of English law arising in Scotch litigation. There is therefore no difficulty at all where a point of Scotch law arises in an English litigation, because it can be decided in *Scotland*, and so a point of English law arising in a Scotch litigation can be decided in *England*. At the same time there may be questions of expense and inconvenience which would deserve attention on a motion to discharge the order for service out of the jurisdiction. It may, in some cases, be very expensive and troublesome to have a Scotch estate administered in *London* or an English estate administered in *Scotland*. But on the other hand it is quite possible, especially in a case like the present, where three of the Defendants are resident in *England*, that an administration in *England* may not cause any additional expense.

I do not however rest my judgment upon considerations of convenience or inconvenience, but upon this ground, that at the trial

C. A.
1882
In re
ORR EWING.
ORR EWING
v.
ORR EWING.
Jessel, M.R.

of an action if the Court has jurisdiction, and a liability is established against a defendant, the Court cannot decline to exercise that jurisdiction, except in the one single case where there is an attempted abuse of jurisdiction, that is where the defendant alleges that he is doubly vexed. We were formerly familiar with the case where a plaintiff sued both at law and in equity at the same time for the same matter, and was compelled to elect in which Court he would proceed. The same case may still occur as regards the County Palatine and the High Court, and there the Court will stop one suit, because such a double proceeding is an abuse of litigation. I should be prepared to say that the same principle would apply to *Scotland*, on the ground that we should give credit to the Queen's Courts in *Scotland*, as I do most cheerfully and fully, that they would administer justice quite as well as the Queen's Courts in *England*. Consequently if there was an administration suit pending in *Scotland*, especially if it was a prior suit, I should think that this Court had jurisdiction to stay the suit instituted in *England* on the ground that the defendants were not to be doubly vexed. I know, however, of no ground on which a Judge can refuse to give a plaintiff the relief to which he is entitled as against the defendant, merely because it might be more convenient in that Judge's opinion that the defendant should be sued somewhere else.

On these grounds I am compelled to differ from the result at which Mr. Justice *Manisty* has arrived, and to say that this order ought to be discharged, and the common administration judgment made in the Plaintiff's favour. This being a family suit it will be best that the costs of the appeal as well as the costs below should be costs in the action.

COTTON, L.J.:—

I am of opinion that the order appealed from was erroneous, and that the Plaintiff is entitled to a decree in the ordinary form.

The facts are very simple. The Plaintiff undoubtedly is interested as *cestui que trust* under a will made by a domiciled Scotchman, and the suit is properly framed, the personal representatives having been constituted such in *England* and being

before the Court. I mention this, because it gets rid of many of the cases cited and of much of the argument. Three of these six Defendants are resident in *England*. The other three are not resident here, but when served out of the jurisdiction they came in and appeared absolutely, and did not in any way object to the sufficiency or propriety of the order for service. That being so, they must, in my opinion, be treated in exactly the same way as if they were subject to the jurisdiction by residence. They had an opportunity, if they thought fit, of appearing conditionally, and moving to discharge the order for service out of the jurisdiction. If they had done so the Court might have considered all the circumstances bearing upon the question—whether it was more reasonable to leave them to be sued in their natural tribunal of residence, or to bring them before a Court which was not their natural tribunal. But that is past, and they are here as Defendants subject to the jurisdiction just as if they had been served in *London*. That gets rid of all the cases which have been cited where upon motion to discharge an order for service out of the jurisdiction, the Court has considered whether in the exercise of its discretion it ought to bring the parties before that which was not their natural tribunal. That being so, we have the simple case of trustees and executors within the jurisdiction being sued by one who, under the will of which they have to administer the trusts, is their *cestui que trust*.

What then are the objections which have been raised by the Defendants? Objections have been raised founded on cases where there was an entirely different state of circumstances, where there were two sets of personal representatives, one appointed by the tribunal of the country where the testator was domiciled, and another and different set of persons appointed representatives in another country where there happened to be personal estate. There the questions which have arisen have been of two kinds. What are the rights of the executors in the country of the domicile as against the administrator appointed in this country, and when and at what stage can the trustees and executors of the country of domicile require the person whom we may call the ancillary administrator to hand over to them the assets collected under the ancillary administration? Those questions in no way

C. A. 1882

In re ORR EWING. ORR EWING *v.* ORR EWING.

Cotton, L.J.

arise here. The cases which perhaps come a little nearer to the present case in form, though not in reality, are the cases as to suing the ancillary administrator in the country where he has collected the assets. *Pipon* v. *Pipon* (1) was a case of that nature. The intestate was domiciled in *Jersey*, and the bill was brought to have the English assets administered here, the general administrator not being before the Court, and it was decided that such a suit could not be maintained. That can have no application where all the persons in whom the estate is vested are here, so that there can be a complete administration, and it is admitted that the Plaintiff is a *cestui que trust*.

Great reliance was placed by the Respondents on the observations of Lord *Westbury* in *Enohin* v. *Wylie* (2). I shall not comment upon those observations, but will only remark that if they bear the sense which was attributed to them by the counsel for the Respondents in the present case, neither Lord *Cranworth* nor Lord *Chelmsford*, who also moved the judgment of the House, in any way acceded to them. Lord *Cranworth* puts the case in a way very appropriate to the present (3): "Applying these well-established rules to the present case, we have to deal with a will valid by the law of the domicile, appointing executors generally, and proved by them in our Court of Probate. By virtue of the probate they as a matter of course obtained possession of the consols in question. The duty of the Court is to take care that they distribute this large fund according to the provisions of the will, all debts having been paid." The Defendants in the present case are just in the same position as the executors there, and in my opinion it is the duty of the Court, unless a strong reason is shewn to the contrary, to see that the fund is properly administered. Lord *Chelmsford* deals with the matter in exactly the same way. It is very true that, when we have to decide the rights of the parties under a Scotch instrument, we must consider whether the Scotch law gives to its terms an effect and signification which the English law would not, and if there is any reasonable doubt on that question we must look to the Courts in *Scotland* to tell us what meaning the Scotch law attributes to the instrument.

(1) Amb. 799.

(2) 10 H. L. C. 1.

(3) 10 H. L. C. 19.

But that does not bear on the question whether the decree should now be made. When there is a decision in the Scotch Court, as there shortly will be, on the point as to the account between the testator's estate and his partners, of course it will be the duty of the Courts in *England* to follow that decision. So if, in working out the decree now to be made, a question should arise turning on Scotch law about which there is any substantial doubt, undoubtedly the Court, if there were a suit there, would wait until that suit had decided the question, or if there were no such suit, would send the question to be decided by a Scotch Court. But that is an entirely different thing from saying that this Court is not to administer the trusts of an instrument where the trustees of that instrument are here subject to the jurisdiction.

It has been strongly pressed upon us that this estate would be more conveniently administered in *Scotland*. Now if there were an administration suit already pending in *Scotland* in which the estate could be administered, and all the questions that can arise in the course of the administration could be decided, though I doubt whether there could be a plea of a pending suit, I do not doubt that it would be the duty of the Court to stop a suit from going on here vexatiously and unnecessarily when all questions could be decided in the Scotch suit by a competent tribunal. In the present case there is no suit in *Scotland* which can be called an administration suit, but only a suit which will decide one of the questions involved in this action.

For these reasons I am of opinion that the appeal must be allowed, and the usual judgment for administration pronounced.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors for Plaintiffs: *Lattey & Hart.*
Solicitors for Defendant: *Johnsons, Upton, Budd, & Atkey.*

H. C. J.

C. A. 1882 Nov. 30.

Ex parte GREAT WESTERN RAILWAY COMPANY. *In re* BUSHELL.

Public Carrier—Lien for Freight—Agreement for General Lien—Bankruptcy—Receiver—Court of Bankruptcy—Jurisdiction.

A trader opened with a railway company a credit account for freight, by which it was agreed that the company should have a general lien for all moneys due by him to them on any account on all goods belonging to him in their hands. He afterwards filed a liquidation petition, under which a receiver of his property and manager of his business was appointed. In order to carry on the business the receiver bought some goods, which he paid for with his own money, and sent them to the company consigned to the trader. The company claimed the benefit of the agreement, and refused to deliver the goods until they were paid the amount which the trader owed them for freight due at the time of the filing of the petition. The receiver in order to obtain the goods paid the company £50 under protest, and then applied to the Court of Bankruptcy to order the company to repay him the £50, and an order was made accordingly :—

Held, on appeal, that the Court of Bankruptcy had no jurisdiction to make the order.

But, *semble*, that the company would have no defence to an action by the receiver for the £50.

In re Northfield Iron and Steel Company (1) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

A. T. Bushell carried on business as a tea and coffee merchant in *London*, and also at *Liverpool* and various other towns in *England* and *Scotland*. He was in the habit of having goods forwarded from *London* by the *Great Western Railway* to some of the other towns where he carried on business. On the 13th of April, 1882, he entered into an agreement with the *Great Western Railway Company* for keeping a ledger or credit account with them for freight. The agreement provided that an account of the charges due from him for the carriage of goods should be rendered monthly, and that such account should be discharged by payment in full of the exact sum shewn to be due within seven days after the delivery of the same, failing which payment interest at the rate of 5 per cent. per annum should become

(1) 14 L. T. (N.S.) 695.

payable and be charged on the unpaid amount from the expiration of the stipulated period. It was also provided that the goods belonging to or sent by *Bushell* should be subject to a general lien in favour of the company for all moneys due to the company from him on any account, and that, in case of bankruptcy, insolvency, or stoppage of payment, such lien should take effect immediately for any sums appearing due in the books of the company. On the 8th of September, 1882, *Bushell* filed a liquidation petition, and on the following day *H. S. Foster* was appointed by the Court receiver of the debtor's property and manager of his business. When the petition was filed *Bushell* owed the railway company £105 for the carriage of goods. Immediately after his appointment the receiver, in order to enable him to carry on the business, purchased some goods from Messrs. *Hanson, Son, Evison, & Barter*, in *London*, and paid for them with money of his own. He directed them to be sent by the *Great Western Railway* consigned to *Bushell* at *Birmingham*, one of the places where he had carried on his business. The goods were accordingly sent on the 12th of September, and when they arrived the company, who had had notice of the liquidation petition, wrote to *Bushell* on the 14th of September telling him that they had exercised their right under the agreement to detain the goods, and that they would not deliver them until the amount which he owed the company was paid. *Bushell* sent this letter to the receiver, and he, on the 16th of September, informed the company that the goods were his, and that he had purchased them with his own money, and insisted that the company were not entitled to any lien against him under their agreement with *Bushell*. The company still refused to deliver the goods, and the receiver paid them £50 under protest. The company thereupon delivered the goods. The receiver then applied to the Court of Bankruptcy for an order that the company should repay the £50 to him as receiver, and the Registrar made an order accordingly. The company paid the £50 and appealed.

Robinson, Q.C., and *Medd*, for the company :—

The Court of Bankruptcy had no jurisdiction to try the question. The receiver bought the goods with his own money, how

C. A. 1882

Ex parte GREAT WESTERN RAILWAY CO. *In re* BUSHELL.

can he bring an outsider into the Court of Bankruptcy? But if there was jurisdiction, the order is wrong. The company are entitled to the lien which they claim under the agreement: *In re Northfield Iron and Steel Company* (1).

[JESSEL, M.R.:—If it is a material distinction, the goods remained the property of the company in that case, notwithstanding the winding-up order. The words of the agreement did apply there; in the present case they do not.]

Herbert Reed, for the receiver, was called upon only on the question of jurisdiction:—

The receiver was also manager of the business. Here he told the company the goods were his own property, and paid the £50 under protest.

JESSEL, M.R.:—

As regards the merits of the case I think the company have made a mistake. The agreement gives them no lien whatever on the receiver's goods, and they would have no defence to an action by him. But on the question of jurisdiction, which the company have chosen to raise—I am sorry to see such an objection taken by a great company, it can only result in more costs—I cannot see what jurisdiction the Court of Bankruptcy had to order the repayment of the money. But, as the company have chosen to argue the case on the merits as well as on the question of jurisdiction, the Registrar's order will be discharged without costs.

COTTON and BOWEN, L.JJ., concurred.

Robinson:—The £50 will be repaid to us?

JESSEL, M.R.:—Yes, if you insist on it. The order will be without prejudice to an action.

Solicitors: *R. R. Nelson; Hindson-Miller & Vernon.*

(1) 14 L. T. (N.S.) 695.

W. L. C.

In re TERRELL.

C. A. 1882 Dec. 11, 18.

Costs—Taxation on Higher or Lower Scale—Rules of the Supreme Court (Costs), August, 1875, Order VI. rr. 1, 3.

An appeal will lie from a decision by a Judge under Rules of the Supreme Court (Costs), August, 1875, Order VI. rule 3, as to the taxation of costs on the higher or lower scale; but where he has exercised his discretion the Court of Appeal will not interfere unless he has proceeded on a wrong principle or made a manifest slip.

An action for the recovery of large estates, the statement of claim in which set up a case of concealed fraud to avoid the operation of the *Statute of Limitations*, was dismissed without costs. The Taxing Master in taxing the costs of the Plaintiff as between the solicitor and a person who had guaranteed their payment, taxed them on the lower scale as coming within Order VI. rule 1, and *Bacon*, V.C., affirmed his decision: —

Held, that the fact of the issue of fraud being raised was not a sufficient reason for directing the costs to be taxed on the higher scale, but that, to take the case out of the general rule that the costs of an action for the recovery of land are to be taxed on the lower scale, the solicitor must shew that the case was one requiring extra skill or labour.

IN 1879 an action of *Evelyn* v. *Evelyn* (1879 E. 80) was commenced to recover possession of large real estates of the annual value, it was said, of about £40,000, devised by the will of *William Evelyn*, who died in 1813, to *Frances Evelyn* for life, with remainder, after certain estates which failed or determined in her lifetime, to *John Evelyn* for life, with remainder to his first and other sons successively in tail male, with remainder to the said *Frances Evelyn* in fee. The Plaintiff claimed under *Frances Evelyn*, who died in 1837.

The statement of claim, after stating the will of *William Evelyn* and the failure or determination of the estates prior to the limitation to *John Evelyn*, alleged that certain other estates were devised by the will of Dame *Mary Evelyn*, who died in 1817, to the said *John Evelyn* for life, with remainder to "— *Evelyn*, son of the said *John Evelyn*, now in the army," for life, with remainder to the first and other sons of "the said — *Evelyn*, son of the said *John Evelyn*," successively in tail male, with divers remainders over. That *John Evelyn* had only one son, and that the son entered the army and was drowned in 1805 or 1806. That *John*

C. A. 1882 ~~ *In re* TERRELL.

Evelyn died in 1827. That shortly after his death one *George Evelyn*, who represented himself to be a son of *John Evelyn*, took possession of Dame *Mary Evelyn's* estate, and died in 1829, leaving children, all of whom were infants, and the eldest of whom was *William John Evelyn*, a Defendant in this action. That after the decease of *George Evelyn* a suit was instituted for the administration of the trusts of Dame *Mary Evelyn's* will. That in this suit the Defendant admitted that *George Evelyn* was the person described in *Mary Evelyn's* will as "— *Evelyn*, son of *John Evelyn*." The statement of claim then contained allegations to the effect that these admissions and certain depositions to the same effect were false and fraudulent, and resulted from a conspiracy.

The statement of claim further alleged that on the death of *Frances Evelyn* in 1837, a suit was instituted on behalf of *William John Evelyn*, then an infant, to have a receiver appointed of *William Evelyn's* devised estates, and that in this suit the proceedings in the former suit were used to prove that *William John Evelyn* was first tenant in tail under *William Evelyn's* will. That *William John Evelyn* had always been aware and admitted that his father was not the legitimate son of *John Evelyn*. That shortly before 1865 the younger brothers of *William John Evelyn* threatened to disclose the fraud to the Plaintiff unless *W. J. Evelyn* would give them a share in *William Evelyn's* estate, which he had accordingly done, and that the Defendant, *E. B. Evelyn*, the youngest son, had subsequently purchased the interests so given to the other younger brothers. That the Plaintiff only discovered these frauds in April, 1879, and that neither she nor her predecessors in title could with reasonable diligence have discovered them earlier.

Mr. *Terrell* acted as solicitor for the Plaintiff in the above action, but after some time gave it up, and it was taken up by another solicitor. The action ultimately was dismissed without costs.

Mr. *Terrell* having delivered his bills of costs, an order for taxation was obtained by a gentleman who had guaranteed the payment of his charges.

The Taxing Master taxed the costs on the lower scale. Mr.

Terrell took the objection that they ought to be taxed on the higher scale. This objection was disallowed by the Taxing Master, and Mr. *Terrell* then took out a summons to have it allowed, and to have the bill referred back. The summons was adjourned into Court, and Vice-Chancellor *Bacon* dismissed it with costs. Mr. *Terrell* appealed, and the appeal was heard on the 11th and 18th of December.

A. A. Terrell, for the Appellant.

H. B. Buckley, for the Respondent, took the preliminary objection that, under Order VI., rule 3, of the Rules of the Supreme Court (Costs), August, 1875, the Judge below had exercised his discretion as to the costs, and that an appeal would not lie.

The Court held that the appeal must go on.

A. A. Terrell:—

This is an action for the recovery of land, and so is one of the actions referred to in sect. iv. of Appendix A., part II., in the Schedule to the *Judicature Act*, 1875, and therefore by Order VI. of the Rules of the Supreme Court (Costs), August, 1875, the costs are *primâ facie* to be taxed on the lower scale. That rule, however, was intended to apply to proceedings in the Common Law Divisions, and the action in which these costs were incurred would, before the *Judicature Act*, have been brought in Chancery, so though the case is within the words of the rule it is not within its spirit. Before the *Judicature Act* there were rules in Chancery as to taxation on a higher and a lower scale, according to the value of the property to which the suit related. Under those rules it was held in *Earl of Stamford* v. *Dawson* (1) that taxation must be on the higher scale in a case where, according to the terms of the rule, it ought to have been on the lower, because the issue was fraud or no fraud, and the difficulty and expense of the proceedings could not be measured by reference to the value of the estate. So here the issue is fraud, and where that issue is raised the case ought to be held to be taken out of the rule, the Court having a discretion under Order VI., rule 3.

(1) Law Rep. 4 Eq. 352.

C. A. 1882 *In re* TERRELL.

H. B. Buckley, contrà, was not called upon.

COTTON, L.J.:—

This is an action for the recovery of land, and is therefore admitted to be an action for a purpose to which one of the forms of indorsement of claims of writs of summons in sect. iv. of part II. of Appendix A. in the Schedule to the Act of 1875 is applicable, and therefore, according to Order VI., rule 1, of the Rules of the Supreme Court (Costs), August, 1875, the costs are to be taxed on the lower scale. It is argued, however, that they ought not to be so taxed, and a decision of Lord *Hatherley* is relied on in support of that contention. Lord *Hatherley*, however, was not dealing with a case under the present rules, but with a suit of a kind not specifically referred to in the rule under which the question arose, and he held that it ought not to be considered to come within the general words of the rule. Such a decision has no bearing on the question which we are considering, inasmuch as the action in the present case is one of a class specifically mentioned in the order.

It is said, however, that Order VI., rule 3, gives a discretion, and that under it taxation on the higher scale ought to be directed. In my opinion that rule does not give such a discretion that the exercise of it by the Judge of the Court below cannot be reviewed, but I think that the Court of Appeal ought not to interfere unless there has been what may be called a manifest slip. If, indeed, the Judge has exercised his discretion on a wrong principle, the Court of Appeal will interfere, but in the present case I do not see any ground for saying that he has so exercised it. It is urged that the case here was one of fraud, which before the *Judicature Act* would have been brought in Chancery, where the rules of taxation are more liberal. But as the case comes within the precise terms of the rule something must be shewn to prove that the solicitor ought to have costs on the higher scale. The action came to a premature end, and we do not know whether any extraordinary skill was required by the solicitor, or whether any extra expense was incurred by him. The allegations of fraud may, for anything we know, have been imaginary.

BOWEN, L.J.:—

I am of the same opinion. I agree that the Court of Appeal has jurisdiction to interfere with the discretion of the Court below, and will interfere if the Judge below has not exercised his discretion at all, or has exercised it on a wrong principle, or where there has been such a slip that justice requires the interference of the Court of Appeal. Here, according to the letter of the earlier rule, the Appellant is out of Court, and I do not see any ground for saying that the Judge has not exercised his discretion under the later rule, nor any reason for saying that the Appellant ought to be allowed costs on the higher scale. Cases of fraud were tried every day in actions of ejectment under the old practice, and I see no reason why an allegation of fraud in the statement of claim should entitle a solicitor to the higher scale of costs. The rules as to costs were intended to apply in the Chancery Division as well as in the Common Law Divisions, it being a mischief that there should be different systems of taxation in the different divisions. The same kind of discretion as to allowing costs on the higher scale was intended to be applied in both of them. The intention was that only in exceptional cases should the costs of certain specified actions be taxed on the higher scale, and to justify such taxation there must be something special in the case; it must be shewn that it was one requiring unusual labour or skill.

Solicitors: *Terrell & Harrison; Donnithorne & Ewer.*

H. C. J.

V.-C. B.
1883
Jan. 24.

STANLEY *v.* GRUNDY.

[1882 S. 525.]

Mortgagor and Mortgagee—Account—Attornment Clause—Mortgagee in Possession.

In taking the account in a foreclosure action between first mortgagee and second mortgagee and mortgagor, an attornment clause in his mortgage deed will not render the first mortgagee liable to account on the footing of mortgagee in possession in respect of the rent reserved by the attornment clause.

FORECLOSURE action against second mortgagee and mortgagor.

By an indenture of the 30th of August, 1881, a mortgage for £1600, which by indenture of the 13th of October, 1869, had been transferred by one *Kidd* to *Kershaw*, was transferred to the Plaintiff by *Kershaw*. *Kidd's* title was derived from an indenture of the 11th of December, 1866, by which certain mortgages for sums amounting to £1600 were transferred to *Kidd*, and a fresh equity of redemption was reserved.

The deed of the 13th of October, 1869, contained the following attornment clause: that *Edward Corbett* (the mortgagor) "doth hereby attorn and become tenant from year to year to the said *John Kershaw*, his heirs and assigns, for and in respect of all and singular the hereditaments and premises hereby granted and now occupied by him, the said *Edward Corbett*, at the yearly rent of £80, clear of all deductions, to be paid by equal half-yearly payments on the 13th of April and the 13th of October, the first half-yearly payment thereof to be made on the 13th of April next," with a proviso that "it shall be lawful for the said *John Kershaw*, his heirs and assigns, at any time, without giving previous notice of his or their intention so to do, to enter upon and take possession of the said hereditaments and premises whereof the said *Edward Corbett* hath attorned tenant as aforesaid, and to determine the tenancy created by the aforesaid attornment."

The Plaintiffs by their action against *Grundy*, a subsequent

incumbrancer, and *Corbett*, the mortgagor, claimed the usual account and payment, and in default of payment a foreclosure.

The Defendant *Grundy*, who claimed to be mortgagee from *Corbett* subsequent to *Kidd*, submitted by his statement of defence that by virtue of the attornment clause contained in the deed of October, 1869, the accounts as against him were to be taken upon the footing of the Plaintiffs and their predecessors in title having been mortgagees in possession and as such chargeable with the rent of £80 reserved by the attornment clause.

Millar, Q.C., and *Alfred Bailey*, for the Plaintiffs:—

No doubt there are *dicta* to be found in bankruptcy cases that the effect of an attornment clause is to make the mortgagee liable to a subsequent incumbrancer, in respect of the rent thereby reserved, for wilful default as a mortgagee in possession: see *In re Stockton Iron Furnace Company* (1); *Ex parte Jackson* (2); *Ex parte Punnett* (3); *Ex parte Harrison* (4); but no case can be found in which as between first mortgagee and second mortgagee, and *à fortiori* as between first mortgagee and mortgagor, an attornment clause has been held to place such first mortgagee in the position of mortgagee in possession, and liable to account on that footing. This view is supported by the opinion of the text-writers, and your Lordship's remarks in *Ex parte Jackson* (5).

Ingle Joyce, for *Grundy*, the second mortgagee, relied on the *dicta* which had been referred to.

The mortgagor did not appear.

BACON, V.C., said that he would not be the first Judge to decide that a mortgagee whose mortgage deed contained an attornment clause was thereby placed in the position of mortgagee in possession, and liable to account on that footing. On the contrary, he was of opinion that the attornment clause was merely an additional security for the mortgagee, as much for the payment of principal as for the payment of interest. A mortgagee was not obliged to

(1) 10 Ch. D. 335.
(2) 14 Ch. D. 725.
(3) 16 Ch. D. 226.
(4) 18 Ch. D. 127.
(5) 14 Ch. D. 729.

V.-C. B. 1883 STANLEY v. GRUNDY.

avail himself of this clause, and there was no pretence for saying that because the mortgage deed contained an attornment clause, under which possession had not been taken, the mortgagee was thereby fixed with all the liabilities of mortgagee in possession. The expressions referred to were merely *dicta*, and were not really in point; and the habit of referring to *dicta* without regard to the facts of the case was most inconclusive. There would be the ordinary foreclosure decree with liberty to the Defendant, the second mortgagee, to apply in Chambers for a sale.

Solicitors: *Chester & Co.*, agents for *Bullock & Worthington, Manchester; Grundy, Kershaw, Saxon, & Samson*, agents for *Grundy, Kershaw, & Co., Manchester.*

F. G. A. W.

HARRIS *v.* JENKINS.

FRY, J.
1882
Dec. 8.

[1882 H. 3371.]

Practice—Pleading—Embarrassing Statement of Claim—Amendment—Right of Way—Rules of Court, 1875, *Order* XXVII., *r.* 1.

In an action to restrain the obstruction of an alleged private right of way, the Plaintiff ought to shew in his statement of claim whether he claims the right by prescription or by grant.

He ought also to allege with reasonable certainty the *termini* of the way and its course.

If the Plaintiff omits to do this his statement of claim is embarrassing, and the Court will order it to be amended.

ADJOURNED SUMMONS.

The Plaintiff by his statement of claim alleged that he was the owner in fee simple of two farms in *Breconshire*, called *Tyfry* and *Glynpenfydd*, and that these two farms were connected by a road which ran through a farm, called *Garvodyla*, of which farm the Defendant was the owner in fee, and which lay between the Plaintiff's two farms. The statement of claim further alleged (par. 4), "the Plaintiff and his tenants, occupiers of *Tyfry* farm, are entitled to a right of foot, horse, and carriage way along the said road through and over the Defendant's farm," and (par. 5) "the Plaintiff and his tenants, occupiers of *Glynpenfydd* farm, are also entitled to a like right of way along the said road through and over the Defendant's farm."

The statement of claim alleged that the Defendant had recently obstructed the road, and that he threatened and intended to continue so to do. And the Plaintiff claimed a declaration of his right, an injunction, and damages.

The Defendant took out a summons asking that the statement of claim might be struck out as tending to embarrass or delay the fair trial of the action, or, in the alternative, that the statement of claim, and particularly paragraphs 3, 4, and 5, might be amended by the Plaintiff in such a manner as to shew the route, boundaries, and terminations of the road mentioned in paragraph 3 of the statement of claim, and the mode in which the rights of way

FRY, J.
1882
HARRIS
v.
JENKINS.

claimed in the 4th and 5th paragraphs were claimed, and the origin, constitution, nature, and extent thereof.

Vernon R. Smith, for the summons:—

The statement of claim is embarrassing. The Defendant does not know what case he has to meet—whether the Plaintiff claims the right by prescription or by grant; this ought to be stated: *Philipps* v. *Philipps* (1). The Plaintiff ought also to shew clearly the course of the right of way which he alleges. If the statement of claim is not struck out it ought to be amended: Order XXVII., rule 1.

Warrington, for the Plaintiff:—

There is nothing in the statement of claim which can tend to prejudice the fair trial of the action. The course of the road is sufficiently identified.

The pleading is in the proper form for pleading such an easement: *Judicature Act*, 1875, Appendix C., Form No. 27; *Bullen* and *Leake's* Precedents of Pleadings (2). The issue put to a jury would be simply whether the Plaintiff is entitled to a right of way: *Seton* on Decrees (3). The Plaintiff might have pleaded alternatively that he is entitled to the right of way either by prescription or by grant, and the Defendant would be in exactly the same difficulty.

[FRY, J.:—You would have done that at your own risk as to costs.]

FRY, J.:—

In my judgment this statement of claim is embarrassing. The right of way to which the Plaintiff alleges that he is entitled might be the result either of a grant or of prescriptive user, and it is very desirable that before the trial of the action the Defendant should know by which title the Plaintiff claims the right. Otherwise the Defendant might be seriously embarrassed. He might come to the trial with witnesses prepared to prove that the

(1) 4 Q. B. D. 127. (2) 4th Ed. Part 1, p. 548.
(3) 4th Ed. vol. i. p. 383.

user of the way had been for less than the legal period of prescription, that it had been a user *clam*, or by permission, and then he might find that the Plaintiff claimed the right under a grant. I think the Defendant is entitled to a short statement by the Plaintiff of the title by which he claims. The right is a legal conclusion from certain facts, and those facts ought to be shortly stated in the pleading. I think also that the Plaintiff ought to shew with reasonable precision and exactitude the *termini* of the right of way and the course which it takes. It may be sufficient to state the names of the closes of land through which it passes, or to refer to their numbers in the tithe commutation map of the parish. The summons must be allowed with costs.

Solicitors for Defendant: *Bell, Brodrick, & Gray.*
Solicitors for Plaintiff: *Goldring & Mitchell.*

W. L. C.

C. A.

1882

Dec. 8.

In re NEW CALLAO.

Practice—Time for Appeal—Informal Notice of Appeal—Letter to Solicitors of Respondent—Extension of Time—Accident or Mistake—Rules of Court, 1875, *Order* LVIII., *rr.* 3, 15—*Costs of Respondent not served with Notice of Appeal.*

24 Ch D 488
490-3
506

A petition for winding up a company having been dismissed the Petitioner's solicitors wrote a letter to the company's solicitor urging him to get the order drawn up, adding, "as we are advised and intend to give notice of appeal." No formal notice of appeal was given till more than twenty-one days had elapsed from the dismissal of the petition, when the Petitioner gave a supplemental notice of appeal:—

Held, that the letter could not be treated as an informal notice of appeal, and therefore the appeal was too late.

Little's Case (1) considered and distinguished:

Held, also, that there was no such mistake or accident as would justify the Court in extending the time for appeal.

Mistake by Appellant may be a ground for extending the time for appeal, without misconduct by Respondent.

Observations of *James* and *Baggallay*, L.JJ., in *In re Blyth and Young* (2), upon *McAndrew* v. *Barker* (3) respecting the grounds for extension of time for appeal, approved.

An appellant ought to serve notice of appeal on all parties who will be affected by the order of the Court of Appeal, and if a party who would be so affected is not served, he may appear without service and obtain his costs. And this rule applies although the appeal fails through irregularity and never comes on to be heard.

IN this case a petition was presented for winding up the *New Callao, Limited.* The petition was heard on the 3rd of August, 1882, by Mr. Justice *Chitty*, who dismissed it with costs.

On the 10th of August the Petitioner's solicitors wrote a letter to the solicitor of the company in the following terms:—

10th August, 1882.

New Callao.

Dear Sir,—We are surprised to find, upon inquiry, that you have taken no steps to draw up the order dismissing petition herein. We are anxious about this matter, as we are advised and intend to give notice of appeal.

We are also advised to apply to you, as representing the

(1) 8 Ch. D. 806. (2) 13 Ch. D. 416. (3) 7 Ch. D. 701.

company, to allow certain portions of quartz alleged to have been brought by Mr. *Shertckley* from the alleged mine, and being those shewn to Mr. *Atwood*, to be handed to Messrs. *Johnson & Co.*, or some other assayers of equal repute, in the presence of Mr. *Atwood* and the company's secretary, to be properly assayed by them and reported upon.

We shall use this letter, together with Mr. *Atwood's* evidence, on the appeal.

Yours truly,

Lewis Davis, Esq. *Greenfield & Abbott.*

No answer having been returned to this letter, and the order not having been drawn up, the Petitioner's solicitors wrote again to Mr. *Davis* on the 3rd of October, 1882, calling his attention to it, and giving him notice that they should proceed to draw up the order themselves for the purposes of the appeal.

On the 30th of October, 1882, the Petitioner served the company with a formal notice of appeal against the order of Mr. Justice *Chitty* for the 2nd of November, and with further notice that this notice was given as supplemental to the notice of appeal contained in the letter of the 10th of August, 1882, written by the Appellant's solicitors to the solicitor of the *New Callao*, and to avoid any question whether the said letter of the 10th of August was a formal notice of appeal, and that it was the intention of the Petitioner immediately to apply to set down the appeal, notwithstanding that the above-mentioned order had not been drawn up.

This was addressed to the *New Callao* (*Limited*) and Mr. *L. Davis*, its solicitor.

The solicitor for the company wrote on the 1st of November, 1882, giving the Petitioner's solicitors formal notice that he should insist on the objection that the appeal was out of time.

The appeal was set down for hearing on the letter of the 10th August, 1882.

On the appeal having been opened,

Crossley, Q.C., and *Bonser*, for the company:—

We take the preliminary objection that the notice of appeal is too late, under Order LVIII., rules 9, 15. The appeal was from the

C. A. 1882 *In re* NEW CALLAO.

simple dismissal of the petition, and ought to have been given within twenty-one days from the dismissal; whereas no formal notice was given till the 30th of October, 1882, more than two months afterwards. The letter of the 10th of August was not a notice of appeal. It was not intended to be one, and it was not addressed to the company but to their solicitor personally: *In re Blyth and Young* (1).

Whitehorne, Q.C., and *Seward Brice*, for the Appellant:—

The letter of the 10th of August, 1882, was a sufficient notice of appeal, although an informal one. It was sent to the solicitor acting for the company in the matter, and that was a substantial compliance with rule 3 of Order LVIII. The Court looks to the intention of the parties; and the Petitioner gave distinct notice by that letter that he intended to appeal. It was impossible that the Respondent could be misled by it. *Little's Case* (2) is directly in point. *Ex parte Saffery* (3) is in our favour. *In re Blyth and Young* is distinguishable.

If the Court should be against us on this point, we ask for an extension of time to appeal. There was no intentional delay, but a mere accidental mistake: *Collins* v. *Vestry of Paddington* (4). The reason for waiting for the order to be drawn up was that the Petitioner expected that the order would include some declaration beyond the mere dismissal of the petition.

JESSEL, M.R.:—

It appears to me that this appeal is clearly out of time, and that there really was no notice of appeal at all.

First of all let us see what a notice of appeal is. It is given under Order LVIII., rule 2, which says that "All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way." Therefore the notice of appeal must be a notice of motion. Then rule 3 is, "The notice of appeal shall be served upon all parties directly affected by the appeal." Consequently it is a notice of motion to be served on the parties to the action or matter. Then rule 4 says:

(1) 13 Ch. D. 416.
(2) 8 Ch. D. 806.
(3) 5 Ch. D. 365.
(4) 5 Q. B. D. 368.

"Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice." Now I come to the document which is supposed to be the notice. It is a letter from one solicitor to another. "Dear Sir—We are surprised to find upon inquiry that you have taken no steps to draw up the order dismissing the petition herein. We are anxious about this matter, as we are advised and intend to give notice of appeal." In the first place, a solicitor knows that that letter is not a notice of motion. In the second place, every solicitor knows that a letter addressed to the other solicitor is not a notice of motion addressed to the party. And, thirdly, every solicitor knows that in a notice of motion, being a fourteen days' notice as this is, there must be some time specified in the notice, and there is none here. Lastly, everybody knows that notice of an appeal is one thing and notice of the intention to give notice of appeal another. They may change their intention, and can anybody suppose that on this letter Mr. *Davis*, to whom it was addressed, could get the costs of an abandoned motion? The answer would have been that he was in too great a hurry; they only told him they intended to give him notice; he ought to have waited till he got the notice. On all these grounds it appears to me manifest that there has been no notice of appeal whatever, and therefore nothing to set down. As regards the supplementary notice that was abandoned.

The only other point that was urged upon us was this. It was said that if there has been no notice to appeal the Appellant is entitled to indulgence. I do not think the Appellant is entitled to indulgence. In the first place, I think it right to say that I agree with the observations of the other two Judges who were sitting with me in the case of *McAndrew* v. *Barker* (1), the late Lord Justice *James* and Lord Justice *Baggallay*, as to the meaning of that decision. I mean the observations they made in *In re Blyth and Young* (2), that it was not intended in *McAndrew* v. *Barker* to say that the equity from accident or mistake, with which the Respondent had nothing to do, did not remain. The words in that judgment are very short, "Unless there has been on the part

(1) 7 Ch. D. 701. (2) 13 Ch. D. 419, 420.

C. A. 1882 *In re* NEW CALLAO. Jessel, M.R.

of the Respondent some conduct raising an equity against him." Lord Justice *Baggallay* says: "This language, though applicable to the case then under consideration, must, I think, admit of some modification where the circumstances are of a special character"; and Lord Justice *James* says with regard to the same judgment, "I wish to say that I think it was a little too strong to say that the Court has no discretionary power to enlarge the time for appealing unless there has been conduct on the part of the respondent raising an equity against him." The Court did not lay down a positive rule in every case; it was not intended, for instance, to apply to the case of the equity arising from an accident, and therefore I take this opportunity of saying that I concur with them as to the meaning of the language used in *McAndrew* v. *Barker* (1).

That being so, what is the ground upon which this Appellant asks for indulgence? I cannot see any. There is no accident, no mistake. The solicitor knows the difference between the notice of appeal, as appears from his letter, and an intention to appeal, and it does appear to me that there is neither accident nor mistake, nor is there misconduct on the part of the Respondents. There is this additional circumstance in winding-up petitions, that it has not, if I may say so, the same final effect as a refusal of leave to appeal has in the case of an action, because another petition may be presented on different grounds by the same petitioner. Any other petitioner can present a petition if he thinks fit: whereas in an action once dismissed it is final. Therefore there is less ground for the indulgence in this case than there is in the ordinary case of an action.

Then it is said that the letter itself was informal notice of appeal, and *Little's Case* (2) was relied on. Now as regards *Little's Case*, of course it is binding on this Court, whenever you get the identical circumstances, but it is not binding if you consider it a case of construction; because nothing is better settled than that the construction put upon an instrument by a Court of law or equity is not binding on another Court of law or equity, even of inferior jurisdiction, as regards the construction of an instrument couched in somewhat similar language. Therefore, if

(1) 7 Ch. D. 701. (2) 8 Ch. D. 806.

you take *Little's Case* (1) to be a case of construction, which I think is the right view of it, it is not binding on us as an authority. If on the other hand you take the other view of it, which is a possible view, but I think not the true view, that it was an application for indulgence, it could only have been granted in the event of mistake. It was an informal notice of motion by mistake. But I do not think that is what was decided. We have some light thrown upon it by *In re Blyth and Young* (2). It happened that the same three Judges who decided *Little's Case* sat in the case of *In re Blyth and Young*. Lord Justice *James* said that a correspondence stating an intention to appeal would not do, and that was in 1880. I do not see that the word "correspondence" differs from a single letter, and when a Judge says a correspondence between solicitors stating they intended to appeal would not do, of course he included a single letter saying they intended to appeal, and, therefore, after *In re Blyth and Young* all solicitors ought to have known that a statement by letter of an intention to appeal would not be sufficient. That puts an end to any notion of mistake. But the ground on which Lord Justice *James* put the case was this, "In *Little's Case*," he says, "the notice was intended as an actual notice of appeal, although it was informal," that is to say, looking at the circumstances of that case, seeing it was in the form of a formal notice, "take notice," that it was served in the regular way, and set down in the regular way, the Court came to the conclusion that the word "intention" was put in by mistake, and that they did not mean it. It meant an actual prosecution of the appeal. That is the way he puts it. Lord Justice *Baggallay* says as regards *Little's Case*, "*Little's Case* was relied on, but in that case the circumstances were special, and the Court was of opinion that the notice, although informal, was a sufficient compliance with the order," and Lord Justice *Cotton* says, "It was quite different from what was done in *Little's Case*, where there was an actual notice of appeal, although an informal one." So they all took the same view, that whatever the wording was, it amounted to an actual notice of appeal, and they all agreed that a letter stating an intention to appeal does not amount to an

(1) 8 Ch. D. 806. (2) 13 Ch. D. 416.

C. A. 1882 *In re* New Callao.

actual notice of appeal. After that it is impossible to say that *Little's Case* (1) can be prayed in aid by the present applicant.

It seems to me that there is no ground whatever for indulgence, and that this appeal must be dismissed with costs.

Cotton, L.J.:—

I am of the same opinion. In a case like this it is of the very utmost importance that a petition shall not be hanging over a company for any greater length of time than is allowed strictly by the rules of the Court, and the question which we have to consider here is, whether that letter of the 10th of August, which has been so often referred to, can be looked upon as a notice of motion of appeal. Now I will not read again the rules which were referred to by the Master of the Rolls, but they define in the most particular way what is to be considered notice of appeal, notice of motion to be served on the parties interested, within a certain limited time, and the question we have really to decide is this. Is this a notice of motion by way of appeal? If one looks only at the first paragraph of the letter as a matter of construction, it is clear to my mind that it is not intended to be notice of motion by way of appeal, but simply notice of an intention hereafter to present such a notice; because it asks when the order will be drawn up, as if it were necessary that the order should be drawn up before notice of motion by way of appeal could be given. "Because we are anxious about this matter, as we are advised and intend to give notice of appeal." The mere fact to which they call attention, that no order had been drawn up, and that they were anxious about it, is entirely inconsistent with that being considered as a notice of motion by way of appeal, or anything else but what it purports to be, namely, notice of an intention to give notice of appeal. When we come to look at the remainder of the letter that is not all. No one, looking at the letter without reference to what the consequence may be, could say that that was intended in any way to be a notice of motion by way of appeal, because they go on to ask for certain other things which they think may be material, if they give

(1) 8 Ch. D. 806.

notice of motion of appeal, and then they add, "We shall use this letter together with Mr. *Atwood's* evidence on the appeal." Was it ever thought necessary to give notice that you would use on appeal the notice of motion for that appeal? It is said that it let the other parties know that they intended to appeal; that is not the question I am now dealing with; it may be a notice to the parties of what the solicitor thought best for the interest of his client, that his intention was to prosecute the appeal, but that in no way bound him. It would have been impossible for the other side to say, "We received this notice; and if it is abandoned we claim to get our costs."

It is said that *Little's Case* (1) is a decision of this Court in favour of the Appellant here. I took part in deciding that case, and I have said nothing about it in the course of the argument, but it is clear not only when one looks at that case, but at the subsequent case, where the point was very similar, of *In re Blyth and Young* (2), that what the Judges who decided *Little's Case* meant to say was that, having regard to the surrounding circumstances, and the terms of the letter, it was a notice of motion by way of appeal which might properly be set down by the Registrar as such. That case cannot certainly be considered as an authority in favour of this letter being a notice of motion by way of appeal, because the letter in *In re Blyth and Young* was very like the present, and I see in one report of that case I am reported to have said in the course of the argument, though I did not use the words in my judgment, "Here you gave notice of your intention, but you did not give notice of your appeal," and that really, as regards the first question, concludes the present case, it is exactly applicable to it.

That being so, ought we in such a case as this to grant liberty, notwithstanding the time has elapsed for the Appellant to appeal? What I said with reference to this being a winding-up petition weighs very strongly upon my mind that, even if there were something of a case for allowing an extension of time, still, in the case of a winding-up petition, I should not grant leave to appeal after the time had expired without a very strong case indeed; because a winding-up petition paralyses the acts of the directors and those who manage the company, and in my

(1) 8 Ch. D. 806. (2) 13 Ch. D. 416.

C. A. 1882

In re NEW CALLAO.

Cotton, L.J.

opinion the Court ought not, without the very strongest case is made, to grant an extension of time.

In the case of *In re Blyth and Young* (1), in which I took part, I said nothing about the circumstances under which the Court would grant an extension, because I thought it better to leave that until the case should arise. But I think I may say that I quite agree with the Master of the Rolls that that expression of his, "Unless there has been on his part some conduct raising an equity against him," may be misunderstood. It is not necessary that there should be something in the conduct of the Respondent which raises an equity against him, but it is necessary that there should be some equity which raises a case for the person proposing to appeal to gain an extension of time. There must be an equity in his favour, either from the act of the other party, or from something else recognised as a ground of equity.

BOWEN, L.J.:—

I am of the same opinion. There are two things which, as it seems to me, ought to be kept distinct. On the one side there are a number of rules which prescribe the machinery for carrying out the different steps towards an appeal. The Court has to construe those rules. On the other side there is a further power contained in other rules for the Court to prevent injustice being wrought by slips or misadventures, and in dealing with slips or misadventures, and in extending its indulgence the Court will, of course, be liberal when it sees it is necessary to be liberal in order to do justice, but the liberality which the Court shews in extending its indulgence where justice requires indulgence to be extended ought not to become laxity in construing the rules which define the machinery which the parties have to put in motion. And in construing these rules about the notice of appeal, it seems to me we must keep clear the two points, first, what the rules mean, and secondly, whether there has been a slip of such a kind as to induce the Court to interfere to mend it. Now, as regards the first point, it seems to me almost too plain for argument that the first step has not been properly taken towards an appeal. The rules prescribe that there is to be a notice of motion, and state

(1) 13 Ch. D. 416.

what the notice of motion is to contain. The notice of motion is to state whether the whole or any part of the judgment or order is appealed from, and is to specify in the latter case what part is intended to be appealed from. When we turn to this letter we find that so far from any definite step having been taken in the matter, all that has occurred is that the solicitor on one side writes to the solicitor on the other, to say that when something else is done he intends to take that step. I should not think there was a solicitor practising in the Supreme Court, or a clerk of any experience to a solicitor, who could not distinguish the difference between a notice of appeal and a letter like the letter which has been put before us.

Then it is said that *Little's Case* (1) is an authority for shewing that these informalities will not be treated as a departure from the rule. I do not think *Little's Case* shews anything of the sort. We are bound by that case whatever it is, but it seems to me that it is simply a decision upon the construction of a particular document. If *Little's Case* is more, if it is an illustration of the way in which the Court will extend its indulgence to cure slips, that has nothing to do with the question I am immediately considering, which is the construction of the rules, and whether this document is a compliance with them. If *Little's Case* is a decision based upon a construction of the document used in *Little's Case*, of course it is no authority whatever as to the proper construction to be put on a different document here.

The second question which we have to consider is whether, assuming this document to be bad as a notice, which I think it is, the Court should extend its indulgence to rectify the defect. I would not myself, especially as I have not yet had the experience, or anything like it, of my brother members of this Court, try to define the exact measure or limits of the discretion which a Court of Appeal ought to exercise in rectifying a blunder. I should be quite prepared to be liberal when justice had to be done. But here it seems to me that there is no sort of ground whatever for rectifying any mistake, or deciding that the parties who wrote the letter are to be placed in a better position on the ground of a slip or mistake; for the best of all reasons,

(1) 8 Ch. D. 806.

C. A. 1882 *In re* NEW CALLAO. Bowen, L.J.

namely, that I do not think there has been any slip, mistake, or accident. I believe what was stated by counsel, that the gentlemen who wrote this document intended at the time to appeal. I am sure they did, but I do not think they thought for a moment that this was equivalent to a notice of appeal. I fail to see that there was any mistake or inadvertence or accident of any kind whatever.

Grosvenor Woods appeared for shareholders who had opposed the petition in the Court below, and had been allowed their costs. He now applied for his costs of the appeal. He was not served with formal notice of the appeal, but was informed by the solicitors for the Appellant of the day when the appeal would be in the paper.

Whitehorne:—It has been decided that there was no notice of appeal, so there was nothing to serve them with. We did not seek for any relief against them. We cannot affect their costs in the Court below behind their backs.

JESSEL, M.R.:—

I am quite clear that the Appellant cannot take advantage of his own irregularity in this way. In strictness he was bound to serve everybody affected by the appeal. It is not correct to say that because a person's interest is not bound the order of the Court of Appeal will not affect him. Supposing there were two persons claiming under a will adversely to a third, and the third person appealed, and only served one of the others, if he got a decision—which might be collusive—in the absence of the other Respondent, would anybody say that the decision did not affect the other Respondent? It is quite plain that the other Respondent would have a right to appear without being served, and claim to argue his case. The Appellant says, "I did not give notice of motion for appeal." His argument just now was that he did. It is true that we decided against him, but he cannot take the benefit of that. His intention was to get the order discharged, and he said so. But besides that he asked for leave to appeal. Leave for what? To appeal against the whole order, not a word

was said about appealing from part of the order. He could not have brought on that motion in the absence of Mr. *Wood's* clients, and he cannot be better off because Mr. *Wood's* clients appeared gratis without being served. Therefore he must pay the costs of their appearance.

COTTON and BOWEN, L.JJ., concurred.

Solicitors: *Greenfield & Abbott; Lewis Davis; Snell & Greenip.*

M. W.

In re TAYLOR'S ESTATE. TOMLIN *v.* UNDERHAY.

[1880 T. 12.]

Will—Erroneous Statement of Fact—Special Case.

A testator gave a legacy of £7000 in trust for his daughter, the wife of *J. T.*, and her children, and after reciting that he had given a bond for £3000 for *J. T.*, he directed that what should remain due on the bond at his death should be paid out of the legacy. By a codicil made about a year afterwards he recited that he had paid the £3000 and other sums for which he was bound for *J. T.* to an amount exceeding £5000 in the whole, and directed that if *J. T.* should not before his death have repaid to him £5000 at least, the sum of £5000 should be taken in part payment of the £7000, and to that extent he revoked the legacy. It was admitted that *J. T.* had not repaid the £5000, but the legatees disputed the fact that the testator had paid so much as £5000 for *J. T.*:—

Held, by *Hall*, V.C., that the legacy must be reduced by £5000, for that the legatees could not dispute the statements made by the testator as to the payments made by him.

Held, by the Court of Appeal that the legacy must be reduced only by the amount remaining unrepaid of sums advanced by the testator for *J. T.*, and that an account must be directed.

In re Aird's Estate (1) not followed.

In an action for the administration of the testator's estate it was ordered that a special case should be stated to obtain the opinion of the Court on the effect of the codicil. The case made it appear that the £3000 had been paid by the testator before the date of the codicil, and the declaration made by the Court of Appeal and the consequent inquiry went on this footing, and referred only to sums paid by him before the date of the codicil. A certificate was made accordingly, and the balance due from *J. T.* was found

(1) 12 Ch. D. 291.

C. A.
1882
In re
TAYLOR'S
ESTATE.
TOMLIN
v.
UNDERHAY.

to be £453. The £3000 had in fact been paid by the testator after the date of the codicil, though he had been called upon for payment before. No subsequent order had been made giving effect to the certificate. The executors on discovering the error applied for leave to amend the special case, which was refused by *Kay*, J., on the ground of want of jurisdiction:—

Held, by the Court of Appeal, that the special case could not be amended. But that where a special case is stated in an action, and a decision given upon it under a mistake of fact, the Court is not bound by that decision unless it has been adopted by subsequent orders, but may disregard it, direct the action to go on to trial, and direct inquiries to ascertain the real facts.

On the present occasion, the parties waiving all technical objections, and the payment of the £3000 after the date of the codicil being admitted, the Court decided that the legacy must be reduced by £3453, it not being material whether the £3000 was paid before or after the date of the codicil.

JOSEPH TAYLOR, by will dated the 12th of May, 1869, directed his executors and trustees to raise out of the proceeds of his residuary estate five sums of £7000 each, and one sum of £10,000. As to one of the sums of £7000, he directed it to be held upon trust for his daughter *Elizabeth Jane Tomlin*, the wife of *John Tomlin*, for life for her separate use, with a restraint on anticipation, and after her death for her children as therein mentioned, and he declared similar trusts of the other legacies of £7000 for his other daughters and their children. The will contained the following proviso:—

"Provided always and I declare that whereas I have entered into a bond with the *National Provincial Bank of England* for the payment of a sum of £3000 which sum they have lent and advanced on the security of my said bond for the benefit of my said son-in-law *John Tomlin* the husband of my said daughter *Elizabeth Jane Tomlin*. Now I hereby direct that if the said sum of £3000 shall not have been paid off and discharged by my said son-in-law *J. Tomlin* previously to my decease the same sum or so much thereof as at my decease shall remain due upon the said bond shall be paid and discharged by my said trustees or trustee out of the sum of £7000 hereinbefore directed to be raised or appropriated or otherwise provided for the benefit of my said daughter *E. Jane Tomlin* and her children or child and as to so much of the same sum of £7000 as shall be required at my decease to

discharge the said bond but not further or otherwise I do hereby revoke the trusts hereinbefore declared for the benefit of my said daughter *E. J. Tomlin* and her children or child in respect of such lastly mentioned sum of £7000 it being my intention that any sum which may be required to be paid by my said trustees or trustee in discharging my liability under the said bond shall be deemed a part satisfaction of the said sum of £7000 of which the trusts are hereinbefore declared in favour of my said daughter *E. J. Tomlin* and her children or child."

The testator made a codicil dated the 5th of April, 1870, the material part of which was as follows:—

"Whereas since the date and execution of my said will I have been required to pay and have paid to the *National Provincial Bank of England* the sum of £3000 for which I had given a bond by way of security for my son-in-law *John Tomlin* as mentioned in my said will and I have also paid various other sums for principal and interest under securities given by me for my said son-in-law *John Tomlin* the total amount of such payments including the said sum of £3000 amounting to upwards of £5000. Now I hereby direct that unless my said son-in-law shall previously to my decease have repaid to me the sum of £5000 at least on account of the payments so made by me for him the said sum of £5000 shall be taken and considered to be in part payment and satisfaction and in reduction of the sum of £7000 by my said will directed to be raised and appropriated or otherwise provided for the benefit of my daughter *Elizabeth Jane Tomlin* and her husband and children or child, and I accordingly revoke all the trusts by my said will declared concerning the said sum of £7000 to the extent of £5000 part thereof."

The testator died on the 7th of January, 1876, and his will and codicil were proved in April, 1876.

This action was commenced in 1880 by the testator's daughter Mrs. *Tomlin* against the executors and her husband for the general administration of the testator's estate.

On the 8th of April, 1880, Vice-Chancellor *Hall* made an order that a special case should be stated under Order XXXIV., r. 2, to obtain the opinion of the Court on the effect of the codicil.

C. A. 1882

In re TAYLOR'S ESTATE.

TOMLIN *v.* UNDERHAY.

A special case was accordingly stated, which, after referring to the will and codicil as stated in the claim, and stating the death and probate, proceeded as follows:—

"4. The Plaintiff admits that, as alleged in the said codicil, the testator before his death paid a sum of £3000, secured by a bond given by the testator as security for the said Defendant *John Tomlin*, and that the testator paid other sums for principal and interest under securities given by the testator on behalf of the said Defendant, but the Plaintiff denies the allegation in the said codicil stating the total amount of payments made by the testator as aforesaid to have been upwards of £5000, but, on the contrary, alleges that on the taking of the accounts it would appear that all such payments as aforesaid amounted at the testator's death to less than £5000, and that he the said Defendant was only indebted to the testator at his death to an amount much less than £5000.

"5. The Plaintiff alleges that Defendant *John Tomlin* made some repayments to the testator before his death, but admits that he did not before the testator's death repay to him the sum of £5000 at least on account of the payments made as aforesaid by the testator."

The case went on to say that the executors submitted that by reason of the failure of *John Tomlin* to repay £5000, the settled legacy of £7000 was reduced to £2000, and that the Plaintiff contended that the £7000 was only to be reduced (if at all) by such a sum (if any) as upon an account between the testator and *John Tomlin* should be found to have been due to the testator at his death in respect of payments by the testator under the bond for £3000 and under any other securities given by him for *John Tomlin*, and that the legacy of £7000 was not in any event reducible below £2000.

The first question submitted was whether under the circumstances stated in the case the settled legacy of £7000 mentioned in the codicil was reduced to £2000, or to what extent (if any) the same was reduced, and whether it must not be £2000 at least.

The special case came on before Vice-Chancellor *Hall* on the 29th of November, 1880.

Hastings, Q.C., and *Medd*, for the Plaintiff, referred to *Campbell* v. *French* (1) as shewing that a statement of fact by a testator was not conclusive.

Robinson, Q.C., and *Bush*, for the executors, were not called upon.

HALL, V.C.:—

The matter is sufficiently clear upon the construction of the codicil. Unless £5000 at least was repaid the legacy was to be reduced by £5000, and it is admitted that £5000 has not been repaid. I consider that the question whether the testator had paid £5000 cannot be entered into, for the Plaintiff is bound by the statement in the codicil. The case in this respect is the same as *In re Aird's Estate* (2).

An order was made declaring that the £7000 legacy was reduced to £2000.

C. A.

The Plaintiff appealed, and the appeal was heard on the 27th of June, 1881.

Hastings, Q.C., and *Medd*, for the Plaintiff:—

On the reasonable construction of the codicil, having regard to the provisions in the will, and to the fact that this is a portion, the Court will hold that so much only as was paid by the testator for *John Tomlin* and was not repaid is to be deducted from the settled legacy.

Robinson, Q.C., and *Bush*, *contrà*:—

The testator recites that £5000 has been advanced, and the legatee cannot raise the question whether so much had been advanced or not: *In re Aird's Estate*. It is admitted that £5000 has not been repaid, and the codicil is express that if that has not been done £5000 shall be deducted from the settled legacy.

[JESSEL, M.R., referred to the observations of Lord *Blackburn* in *Caledonian Railway Company* v. *North British Railway Company* (3).]

(1) 3 Ves. 321.
(2) 12 Ch. D. 291.
(3) 6 App. Cas. 114, 132.

C. A. 1882 *In re* TAYLOR'S ESTATE. TOMLIN *v.* UNDERHAY.

JESSEL, M.R.:—

I entertain no doubt as to the meaning of this codicil. If it had been accurately worded we should have had no discussion, but it is inaccurately worded, and in construing it we must have regard to the surrounding circumstances and must consider the will as well as the codicil. The surrounding circumstances are that a father making provision for his daughter gives a legacy of £7000 in trust for her for life and then for her children. He then notices that he has given security on behalf of *John Tomlin*, the daughter's husband, for £3000, and directs that if at his decease *John Tomlin* shall not have paid off the £3000, then so much of it as shall not have been paid off shall be paid out of the £7000, and to that extent he revokes the trusts of the £7000. This shews his intention to be only to protect his estate, to prevent the omission of the son-in-law to pay the debt from causing a loss to his other children and their families. If the son-in-law had after the testator's death paid the debt to the creditor, the legacy of £7000 would have had to be paid in full, for the liability of the testator would have been discharged. Then comes the codicil, in which the testator states that he has paid the £3000 and other sums for which he was security for *John Tomlin* to an amount exceeding £5000 in the whole. [His Lordship read the codicil.] If this be read literally it comes to this, that if before the testator's death the son-in-law falls short by £1 of paying £5000, the daughter and her children are to lose £5000. The testator cannot have intended this. Neither can he have intended that if the son-in-law paid off his debt to the bank immediately after the testator's death the daughter and her family should lose £5000. I think that what the testator meant, though he has expressed it in the most bungling way, is that if the son-in-law owed more than £5000 the daughter was only to lose £5000. When there are two possible constructions of a clause, one strict and the other lax, if the former leads to a palpable absurdity the Court will adopt the latter.

BAGGALLAY, L.J.:—

I am of the same opinion. I think that the testator only intended to carry out by his codicil the intention expressed in his

will of protecting his residuary estate from loss through the default of his son-in-law. He states in his will that he is liable for the £3000, and directs so much of it as has not been paid by *John Tomlin* before his the testator's decease to be paid out of the legacy. By the codicil made nearly a twelvemonth afterwards he states that he has paid the £3000 and other sums for the son-in-law to an amount exceeding £5000, and, carrying on his former idea, he says that unless £5000 at least is paid the £5000 shall be taken in part payment of the legacy. I think he meant that to the extent of £5000 what remained due at his decease should be paid out of the legacy if £5000 had not been repaid.

LUSH, L.J.:—

The leading intention of the testator appears clearly from his will and codicil. Each daughter was to have a settled legacy of £7000. By his will he directs that the liability existing at his decease in respect of the £3000 should be satisfied out of Mrs. *Tomlin's* legacy. In the codicil he states that he had paid that sum and more for the son-in-law, and I have not the least doubt that what he intended was that what at his decease should be due to him in respect of these sums should, to an extent not exceeding £5000, be deducted from the daughter's legacy. The literal reading of the codicil leads to a result so manifestly absurd that we ought not to adopt it.

It was accordingly ordered that Vice-Chancellor *Hall's* order, in so far as it declared that under the circumstances the settled legacy of £7000 was reduced to £2000, should be reversed, and it was declared that the said legacy ought to be reduced only "by so much of the sums which at the date of the said codicil had, on account of the payments therein mentioned, been paid by the testator" to or on account of *John Tomlin* as had not been repaid by him. And it was ordered that an account should be taken of the sums so paid by the testator as aforesaid and of the amounts so paid by *John Tomlin* to the testator on or before the date of the death of the testator.

The Chief Clerk, by certificate dated the 6th of May, 1882,

C. A. 1882 — *In re* TAYLOR'S ESTATE. TOMLIN *v.* UNDERHAY.

found that the sums paid by the testator to or on account of *John Tomlin* at the date of the codicil amounted to £1264, and that *Tomlin* had repaid £810 17*s.* 6*d.*, leaving a balance of £453 2*s.* 6*d.* due from him.

It appeared from the accounts brought in under this inquiry that the testator had not at the date of his codicil made any payment in respect of the £3000 mentioned in the will and codicil, but that he afterwards before his death paid the whole of that £3000. He had, it appeared, been called upon for payment before the date of the codicil.

The executors on the 1st of June, 1882, took out a summons asking that, notwithstanding the order of the Court of Appeal and the certificate, the special case might be amended so as to accord with the facts, and that the amended case might be heard and the certificate of registration be varied, according to the judgment to be given on the amended case.

Mr. Justice *Kay* on the 9th of June dismissed the summons, being of opinion that he had no jurisdiction to make the order asked. The executors appealed. The appeal was heard on the 18th of December, 1882.

Robinson, Q.C., and *Bush*, for the Appellants, having stated the case:—

[BOWEN, L.J.:—Under what clause in the Act or Rules is there power to amend the special case after the order upon it has been completed?]

Under Order XXVII., rule 6.

[JESSEL, M.R.:—I do not think that this authorizes amendment after the case has been disposed of. It appears to me that Mr. Justice *Kay* was right in holding that he had no jurisdiction, and I do not see that we have. But as the declaration on the special case has not been followed up by any order carrying it into effect, the Court is not bound by that declaration, if it be proved to have been made under a mistake, and the action can go on to trial, and inquiries can then be directed which will bring out the facts so that justice can be done. If the Plaintiff makes the requisite admissions the case may be disposed of now.

Hastings, Q.C.:—The Plaintiff has no wish to necessitate further proceedings and will waive technical objections. She admits that £3000 was paid by the testator under the bond after the date of the codicil.]

Hastings, Q.C., and *Medd*, were then heard for the Plaintiff, the argument being chiefly directed to the question whether the mistake was not occasioned by the default of the executors, and whether they ought not to pay the costs.

JESSEL, M.R.:—

In this case there has been a miscarriage, and we need not inquire now which party is most in fault. Mistakes are the inevitable lot of mankind. The parties have waived all technical objections, but if not we should have been able to overcome them and to arrive at the merits of the case before us. The substance of the matter is this—the testator by his codicil erroneously stated that he had at that time paid £3000, being a sum which he was liable to pay and had been called upon to pay and did pay afterwards. In the special case that erroneous statement was assumed to be correct, and the Court decided on that footing. The Court of Appeal on the former occasion if the real facts had been before it would have directed the account in such a form as to take in sums paid by the testator under his bond after the date of the codicil. The question is how the error can now be set right. The special case was directed in the action for the purpose of deciding a question of law, and that question was decided on an erroneous statement of facts. When it is shewn that the decision was given on an erroneous statement, if it has not been followed by orders acting upon it, the Court is not bound by it, but can direct the action to go on to trial, and then direct inquiries to ascertain the facts. In the present case no inquiry is needed, as it is admitted that the testator paid the £3000 after the date of the codicil, and it is clear therefore that the balance of £453 found by the Chief Clerk must be increased by £3000 and the legacy will be reduced by £3453. We do not make an order varying the certificate, since it was quite right under the terms of the order of reference, but our order will declare that notwithstanding the certificate the £7000

C. A. 1882 — *In re* TAYLOR'S ESTATE. TOMLIN *v.* UNDERHAY.

legacy to Mrs. *Tomlin* and her children is to be reduced by £3453.

COTTON, L.J.:—

I am of the same opinion, and should not add anything were it not that the question as to the effect of a decision on a special case is important. It was directed that a question of law arising in the action should be decided by means of a special case. If after a decision on the special case it is made to appear to the Court that it has been given on an erroneous statement of facts, I agree with the Master of the Rolls that the Court is not bound by the decision, but can put the matter in course of trial. I also agree that on the merits it makes no difference whether the £3000 was paid before or after the date of the codicil.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors for Plaintiff: *W. Tatham & Son.*
Solicitors for Executors: *Fladgate, Smith, & Fladgate.*

H. C. J.

C. A. 1882 — *Nov.* 11.

DAWSON *v.* BEESON.

[1882 D. 1569.]

Practice—Short Notice of Motion—Power of Court to disregard Irregularities—Rules of Court, 1875, *Order* LIII., *r.* 4; *Order* LIX., *r.* 1—*Partnership—Expulsion of Partner — Injunction to restrain expelled Partner from soliciting Customers of Old Firm.*

Where a party applies for special leave to serve short notice of motion he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party.

But in a case where short notice of a motion had been irregularly applied for and served, but the party served had not been injured by the irregularity, the Court exercised its discretion under Order LIX., rule 1, and disregarded the irregularity and heard the motion on the merits.

A partner who has been expelled under a provision in the articles of

partnership, and has been repaid his share of the capital, will not be restrained from carrying on the business on his own account, and soliciting the old customers of the firm.

Walker v. *Mottram* (1) followed.

THE writ in this action was issued on the 25th of July, 1882, by *G. Dawson* and *G. Harris* against *W. H. Beeson* for a declaration that the partnership between the Plaintiffs and the Defendant in the business of horse slaughterers and tillage manufacturers, at *Carbrook*, near *Sheffield*, was dissolved as from the 22nd of July, 1882, and for an injunction to restrain the Defendant from intermeddling with the assets, and from carrying on the business under the style and firm of *Beeson, Dawson, & Harris*, and from representing himself to be a partner with the Plaintiffs in such business, or to be carrying on such business in succession to or continuation of the business which was carried on by him and the Plaintiffs, and from soliciting or procuring to be solicited the old customers of the firm to employ the Defendant in the said business.

The partnership had been carried on under articles dated the 1st of March, 1882, by which it was stipulated among other things that the partnership should be carried on for the term of seven years: that if either of the partners should die during the continuance of the partnership the surviving partner or partners should be entitled to the said partnership business, on payment to the executors or administrators of the deceased partner or partners of the amount of capital of such deceased partner or partners for the time being in the said business, such payment to be made by four equal instalments at the end of six, twelve, eighteen, and twenty-four months from the date of the death of such deceased partner or partners. It was also provided that if either of the parties should during the continuance of the partnership become lunatic or otherwise incapable of assisting in the management of the business, or should become a bankrupt, or make a composition with his creditors, or allow his affairs to be liquidated by arrangement, or do or suffer any act whereby any part of the partnership property should be seized or taken in execution, or do certain other acts therein mentioned, it should be lawful for the other

(1) 19 Ch. D. 355.

C. A. 1882 DAWSON v. BEESON.

partner or partners at any time within fourteen days after the discovery of such lunacy or act to expel the partner so becoming lunatic or offending, from the said partnership by giving him one week's notice, and immediately on the expiration of such notice, the said partnership, so far as such expelled partner was concerned, should cease and determine, and thereupon the partner or partners giving such notice should be liable to pay to the expelled partner the amount of the capital for the time being of such expelled partner by such instalments as though such expelled partner were dead.

The Defendant suffered execution at the suit of the *Birmingham, Dudley, and District Banking Company*, for £160, and on the 19th of July, 1882, the sheriff took possession of some of the partnership property. The Defendant was also accused of having done other acts in contravention of the articles of partnership.

The interest of the Defendant in the partnership property was sold by the sheriff, and purchased by the Plaintiffs for £100.

On the 15th of July, 1882, the Plaintiffs served the Defendant with notice of dissolution of the partnership at the expiration of a week; and the Defendant having threatened to collect the partnership debts and to carry on the business, the Plaintiffs issued the writ above mentioned.

On the same day, namely, the 25th of July, 1882, the Plaintiffs moved *ex parte* before Mr. Justice *Chitty* for an injunction in terms of the indorsement on the writ, and for a receiver of the partnership property, and for special leave to serve the Defendant with notice of the injunction and with the writ of summons for the 28th of July, 1882.

It did not appear that the counsel who made the motion specially asked for short service of notice of the writ and injunction; and the order as drawn up, after giving notice of the injunction, contained the following clause:

"And also take notice that special leave to serve you with this notice and with the writ of summons has been obtained this day from the said Hon. Mr. Justice *Chitty*."

This notice was served on the Defendant at *Sheffield* on the 26th of July.

The Defendant did not appear on the 28th of July, and on that day the injunction was granted, and a receiver appointed in terms of the motion.

On the 4th of August the Defendant moved before Mr. Justice *Chitty* to discharge the order of the 28th of July, on the ground that the notice had not been duly served.

Mr. Justice *Chitty* directed the motion to be brought before the Vacation Judge on his first motion day, and at his Lordship's suggestion the notice of motion was amended by striking out the words, "on the ground that it had not been duly served," in order that the merits might be gone into before the Vacation Judge if necessary.

On the 23rd of August the Defendant renewed the motion before the Vacation Judge, Mr. Justice *North*, who dismissed the application with costs.

The Defendant appealed from this decision.

Chester, for the Appellant:—

The service of the notice on the Defendant was insufficient. In the first place, it does not appear that the Court was distinctly told that short notice was required; and as the motion was made on the 25th of July there was time to give the Defendant the two clear days' notice which he was entitled to under Order LIII., rule 4. In the second place, it did not appear on the notice, as served, that leave for short service had been obtained. This is always necessary in order that the party served may know whether he is bound to obey it or not: *Hart* v. *Tulk* (1); *Newton* v. *Chorlton* (2); *Daubney* v. *Shuttleworth* (3); *Seton* on Decrees (4). The practice was specially laid down by Lord Justice *Knight Bruce*, when Vice-Chancellor, in *Harris* v. *Lewis* (5). The Defendant is, therefore, entitled to have the order discharged.

Ince, Q.C., and *Langworthy*, for the Plaintiffs:—

The notice of motion shewed that special leave of service had been obtained for a particular day, and that was sufficient. What-

(1) 6 Hare, 611.
(2) 10 Hare, App. 31.
(3) 1 Ex. D. 53.
(4) 4th Ed. p. 57.
(5) 8 Jur. 1063.

C. A. 1882 DAWSON v. BEESON.

ever the practice might have been in Vice-Chancellor *Knight Bruce's* Court, it certainly has not been the uniform practice of the Courts to state in the notice of motion that it is short notice. Leave was properly obtained for the particular day named, and if the Defendant did not appear it was at his own peril.

But assuming that there was an irregularity in this case the Defendant cannot take advantage of it. He has amended his motion, so that the merits may be gone into, and he has suffered no injury from the form of the service. The Court has full power to disregard any irregularity under Order LIX., rule 1.

Upon the merits we are entitled to the injunction. There is no dispute that we had a right to expel the Defendant, and he ought not to be allowed to represent that he is continuing to trade under the old partnership.

Chester, in reply :—

If the merits are gone into, the injunction is too wide. There is no ground for restraining the Defendant from carrying on the same business or from soliciting the old customers of the firm. The Defendant has been expelled from the partnership, and is in a very different position to a partner who has voluntarily withdrawn. He is bound by no contract with the continuing partners: *Walker* v. *Mottram* (1); *Ginesi* v. *Cooper* (2); *Leggott* v. *Barrett* (3).

JESSEL, M.R. :—

This motion involves an important point of practice, and on the investigation of the authorities the case of *Harris* v. *Lewis* (4) has been cited, which shews the practice which Lord Justice *Knight Bruce*, when Vice-Chancellor, adopted in his Court, namely, that when an applicant obtained short notice of motion he should state on the notice which is served on the other party that leave was obtained to serve the notice on a certain day for a certain day, so that the person served should understand not only that he was to appear on the day appointed, but that leave had been given to serve the notice short of the two clear days to which he would

(1) 19 Ch. D. 355.
(2) 14 Ch. D. 596.
(3) 15 Ch. D. 306.
(4) 8 Jur. 1063.

otherwise have been entitled. That was a reasonable practice; for the party served is entitled to know that the notice has been duly served upon him. We think, therefore, that whether that practice has been usually followed or not in the other Courts up to this time, it ought to be understood that it is to be the practice for the future, so that there may be no mistake about it.

As regards the application in this case; in all cases where the applicant asks for short notice he ought to state to the Court that he applies for that short notice, not merely to leave it to be inferred. He must ask for it in distinct terms. This does not appear to have been done here. It was intended to be a short notice, but it does not appear to have been expressly so stated to the Court. The party who relies on the notice is bound to shew that it was distinctly stated. Therefore I think that this order was irregularly obtained, and also that the service was irregular. But the question then arises whether we ought to give effect to this objection. Nothing can be more distinct and valuable than the first rule of Order LIX., which enables the Court to do justice without regard to technicalities. In the present case if the party served had appeared the same injunction would have been granted, except in one particular to which I will allude presently: in substance he could not have resisted it. That being so, is he entitled to come now and have the order set aside, merely because the service was irregular? He must, I think, be taken to have had notice that the Court has power to disregard irregularities and to decide on the material question. But the Defendant complains on the merits that he is restrained from soliciting customers. The Plaintiffs say that they had a right under the articles to expel their partner. Well, they did exercise that right and expelled the Defendant, and then they bought the Defendant's interest in the property from the sheriff. That is not equivalent to a voluntary alienation by a vendor, it is like the case of the alienation of a debtor's property by bankruptcy. The Defendant loses the right to the business, but he does so involuntarily. He is turned out against his will, and is only entitled to receive the value of his share as if dead. He is not in the same position as a partner resigning voluntarily. Looking at *Walker* v. *Mottram* (1), I think

(1) 19 Ch. D. 355.

C. A. 1882 DAWSON v. BEESON.

that he ought not to be restrained from carrying on the business in his own name and soliciting customers. That part of the order must be struck out.

With respect to costs, I think that, considering all the circumstances, justice will be done by making all the costs costs in the action.

COTTON, L.J. :—

The only point before the Judge in the Court below was whether the motion had been regularly obtained and served. I have always understood the rule of practice to be that, inasmuch as the rules give to every party the right to a certain length of notice before he can be required to appear, if that period is dispensed with by leave of the Court the notice ought to state distinctly that the time has been shortened by the Court in order that the party may consider whether he is bound to obey the notice. Here the notice did not state that leave was given for short notice; therefore the Defendant was entitled to disregard it, and I find that is laid down by Vice-Chancellor *Knight Bruce* in *Harris* v. *Lewis* (1), and the same point was decided by Vice-Chancellor *Kindersley* in *Chambers* v. *Toynbee* (2). I have always myself understood that to be the practice. At any rate for the future it must be understood that this practice is to be followed. When leave is given for short service of notice it must not only be stated in the notice to be by special leave, but that leave was obtained for service on such a day for such other day; or that leave was given for one clear day's notice, as the case may be.

Therefore if the matter rested on this question alone, I think the Defendant would be entitled to have the order discharged. But I do not think we ought to dispose of it on that ground. I am not myself inclined to allow a party to take advantage of technical objections when he has not been deprived of the opportunity of defending himself. Having regard to the nature of the order in this case and to the fact that the Defendant has amended his notice of motion so as to enable the Court to enter upon the merits, I think we ought to treat the case as if the Defendant had

(1) 8 Jur. 1063. (2) 12 W. R. 1100.

appeared on the motion for injunction and the Court were considering what order ought to be made.

On this point, I am of opinion that the part of the order which restrains the Defendant from soliciting the old customers of the firm ought to be struck out. There is nothing in the partnership articles to justify it. If either partner does certain acts or becomes subject to certain liabilities the partnership may be brought to an end, and he is entitled to be paid in that event the amount of his capital as if he were dead. There is nothing said about the purchase of his share of the business, but only of his capital. Therefore I think that although he cannot carry on the business as the business of the old firm there is nothing to prevent his carrying on the business on his own account. It is just as if the partnership had been dissolved and each party left at liberty to carry on the business as he likes.

With respect to the costs, I agree that they should be made costs in the action.

Solicitors: *J. Chapman ; C. Butcher.*

M. W.

SUTTON *v.* SUTTON.

[1882 S. 1188.]

Statute of Limitations—37 & 38 *Vict. c.* 57, *s.* 8—*Covenant in Mortgage Deed.*

The limitation of twelve years imposed by the *Real Property Limitation Act*, 1874, s. 8, to actions and suits for the recovery of money charged on land applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land.

The marginal notes to the sections of an Act of Parliament are not to be taken as part of the Act.

Dictum in *In re Venour's Settled Estates* (1) corrected.

DEMURRER.

The statement of claim alleged as follows:—

By an indenture dated the 13th of May, 1868, and made between the Defendant of the one part, and *G. F. P. Sutton* of the other part, in consideration of £1850 advanced by *Sutton* to the Defendant the Defendant covenanted with *Sutton* that he

(1) 2 Ch. D. 522, 525.

C. A. 1882 SUTTON v. SUTTON.

would on demand pay or cause to be paid to *Sutton*, his executors, administrators, or assigns, the said sum of £1850, and interest at the rate of £5 per cent. per annum, and would also on demand pay to *Sutton*, his executors, administrators, or assigns, all costs of and relating to the said indenture and attending the execution of the trusts and powers therein declared.

G. F. P. Sutton died in March, 1870, having by his will appointed the Plaintiff his sole executrix, who proved the will on the 19th of December, 1881.

The Defendant paid various sums for principal and interest to *Sutton*, the last payment being of a sum of £100, which he paid on the 12th of November, 1869.

The Plaintiff had applied to the Defendant for payment of what was due for principal and interest, but he had refused or neglected to do so. The Plaintiff claimed payment of what should be found due under the covenant.

The Defendant put in a defence, in which he stated that the indenture of the 13th of May, 1868, was in fact an indenture of mortgage whereby the principal sum and interest mentioned in the statement of claim were secured by a mortgage of and charged upon certain lands and hereditaments at *Berkhampstead*.

The 4th paragraph of the statement of defence alleged that no part of the said principal money nor any interest thereon had been paid, nor had any acknowledgment of any right thereto been given in writing signed by the Defendant or any person as his agent, or otherwise to any person entitled thereto as his or her agent since the 12th of November, 1869, which was more than twelve years before the commencement of the action, and the Defendant claimed the benefit of the provisions of the *Real Property Limitation Act*, 1874, and of all Statutes of Limitation in bar to the relief sought by the statement of claim.

The Plaintiff demurred to the 4th paragraph as being bad in law.

Mr. Justice *Chitty* allowed the demurrer, and the Defendant appealed from this decision.

Romer, Q.C., and *J. G. Wood*, for the Appellant:—

The question turns upon the effect of the 8th section of the

Real Property Limitation Act, 1874 (1). The Plaintiff contends that although the right to enforce the charge on the land either by sale or foreclosure is barred at the end of twenty years, an action on the covenant may still be brought and will not be barred till the expiration of twenty years, as before the Act.

But that is not the true construction of the section. The words of the section are copied from the 40th section of the 3 & 4 Will. 4, c. 27. That section applied to covenants in a mortgage deed, and it was held in *Harlock* v. *Ashberry* (2) that it did not apply to a foreclosure suit, which is a suit for the recovery of land: *Wrixon* v. *Vyse* (3). In *Doe* v. *Williams* (4) *Littledale*, J., says the 40th section relates to actions to recover the money, either upon the covenant usually inserted in the mortgage deed or on the bond which usually accompanies it. This is borne out by the marginal note of sect. 8 of the Act of 1874, which says, "money charged on land and legacies to be deemed satisfied at the end of twelve years." If the money is satisfied it cannot be recovered under any proceeding. The marginal note may now be read in aid of the interpretation of the section: *In re Venour's Settled Estates* (5).

[JESSEL, M.R.:—The *dictum* in that case is not strictly correct. I have since ascertained that the practice is so uncertain as to the marginal notes that it cannot be laid down that they are always on the Roll. But the title of the Act is always on the Roll.]

The expressions used in the section shew that personal actions

(1) 37 & 38 Vict. c. 57, s. 8: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment or the last of such payments or acknowledgments if more than one was given."

(2) 19 Ch. D. 539.

(3) 3 D. & War. 104.

(4) 5 A. & E. 291.

(5) 2 Ch. D. 525.

C. A. 1882 SUTTON v. SUTTON.

as well as suits for the recovery of the land were intended. The Act was passed before the *Judicature Act* came into operation, when there was a distinction between actions at law and suits in equity. It also refers to legacies, and that word cannot be confined to legacies charged on real estate.

Macnaghten, Q.C., and *Etherington*, for the Plaintiff:—

The section in question only applies to the recovery of the money by enforcing the charge on the land. Its object was to clear the land from the incumbrance; it leaves untouched the personal remedies of the mortgagee by covenant or otherwise. The effect of deciding that this section bars the remedy on a covenant in a mortgage deed will be that mortgagees will have to take a covenant by a separate deed. The observation of *Littledale*, J., which has been referred to was merely a *dictum*.

Although the present question could not arise under the 40th section of the 3 & 4 Will. 4, c. 27, because the periods of limitations for enforcing the charge on the land and suing on the covenant were the same, yet a similar question arose under the 42nd section, and it was decided that although six years arrears of interest could only be recovered against the land, the right to recover on the covenant remained for twenty years: *Hunter* v. *Nockolds* (1); *Lewis* v. *Duncombe* (2); *Sims* v. *Thomas* (3).

[JESSEL, M.R., referred to *Henry* v. *Smith* (4).]

Our construction is borne out by the title of the Act, which only refers to "real property," and the preamble, which only speaks of the "recovery of land or rent," and this is also the understanding among conveyancers: *Prideaux* on Conveyancing (5).

JESSEL, M.R.:—

This is an appeal from a decision of Mr. Justice *Chitty*. I am sorry to say that we have not been furnished with any note of the judgment in the Court below, and therefore I am unable to

(1) 1 Mac. & G. 640.
(2) 29 Beav. 175.
(3) 12 A. & E. 536.
(4) 2 D. & War. 381.
(5) 11th Ed. vol. i. p. 468.

695

ascertain the real grounds on which the learned Judge founded his decision.

The sole question that we have to decide is whether when no principal or interest in respect of a mortgage debt has been paid, and no acknowledgment in writing has been given for the space of twelve years, an action on the covenant contained in the mortgage deed is maintainable or not. That question depends for its decision upon the true construction of the 8th section of the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57).

But before reading the section upon which, of course, everything turns, I must say a few words and a few words only upon the nature and origin of the limitation with regard to the right to sue under such circumstances. The period of twenty years having been established as a bar to actions of ejectment, the same period was extended by the Judges to actions on bonds by analogy, and eventually became the settled law. After the lapse of twenty years without any payment having been made, it was said that it must be presumed that the debt had been satisfied. Then again that doctrine was extended somewhat, and ultimately it went to this extent, that if the mortgagor remained in possession for twenty years, and did not give any acknowledgment the mortgage would be presumed to be satisfied. That being the state of the law the *Statute of Limitations* (3 & 4 Will. 4, c. 27) laid down the same limitation to the recovery of a mortgage debt. What did that mean? Did it mean to cut down the old right as to presumption of payment? Surely not. If there is a presumption of payment by non-payment of any of the principal and interest or by not giving an acknowledgment, the statute was not intended to interfere with that, but rather to give legislative authority to that which had previously rested on judicial decision only. I think that is the fair view which we ought to take of the statute. If that is so, of course, the mere fact of saying you shall not recover upon a mortgage, would not keep alive any remedy upon the mortgage, whether that remedy was upon a covenant contained in the mortgage itself, or upon the implied promise which is presumed in law from the fact of accepting the loan; because it has been decided that if there is no covenant and no accompanying bond, there is still the implied promise to pay;

C. A. 1882 SUTTON v. SUTTON. Jessel, M.R.

and if there is a time fixed either by recital or otherwise for the repayment, in many cases depending upon the construction of the instrument, the Court will imply even a covenant to pay. That being so, every mortgage contains within itself, so to speak, a personal liability to repay the amount advanced.

Let us now see what this 8th section of the *Real Property Limitation Act* says. [His Lordship read the section, and proceeded:—] Now the words that are material are, "No action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage." It is impossible to say that those words do not include this sum of money. It is a sum of money secured by a mortgage. Those who say that these words are not to be read literally must shew some reason why they should not. What they say is that it does not mean to recover any sum of money secured by a mortgage, but that it means to recover the money so far as it can be recovered by a sale of the land or by the receipts of the rents: that is to say, so far as you can get it out of the land. That construction puts words there which are not to be found in the section; and more than that, it gives no meaning to words which are to be found in the section, because you could not get that money as against the land at the period when this Act was passed except by a suit in the Court of Chancery. You could not have brought an action at law for that purpose. There is another reading which makes it much plainer, and that is that the words "at law or in equity" belong to the words "action or suit," because the words "at law" have no particular meaning when you have got the words "charged upon any land," and therefore it is probable that the words are not put in their right position. But independently of that, when you consider that a proceeding at law is called "an action" and a proceeding in equity is called "a suit," and when you get the two words "action" and "suit" together, it is plain to my mind that those who framed that section meant any proceeding in which any sum of money secured by a mortgage might be recovered. But the section does not stop there, for it says "or any legacy." To my mind there is nothing to cut down the meaning of the word "legacy." The word "legacy" stands there alone, following the words "otherwise charged upon or payable out of any land or rent at law or in

equity," and that has been held to apply to legacies payable out of personal estate. I think that gets rid of another argument, that the Act is obviously an Act passed with reference to real estate only, and therefore that we ought to restrict this section to real estate, because that is the general purview of the Act. But when you consider that you have the word "legacy" in it, which has been decided to be general and to apply to both real and personal estate, that shews that you cannot cut down the words by reference to the general purview of the Act. That gets rid of any question as to the preamble or the title.

Then there is this observation to be made. The principle on which the law has always been based is either actual satisfaction or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay. It seems absurd that you should get rid of the greater, so to speak, namely, the security upon the land, and should nevertheless retain the lesser, namely, the personal liability to pay. The result, to my mind, would be too absurd. It is not a decisive or conclusive reason, but it is a reason.

Then it is said that there is another ground for supporting the Respondent's contention, namely, that in the case of a bond or covenant where the debt is not secured upon land there is no such provision. The only answer to be given to that is that the Legislature has not provided for every possible case. No doubt there is an omission. The same observation would apply to "legacies" to which this section certainly has reference. It has been decided, and in my opinion rightly decided, that the word "legacy" includes a share of residue, but it only includes it where there is an executor named. If there is no executor named, so that the man dies intestate in law, or if he dies actually intestate, that is without having made any will at all, then the section does not apply, and therefore another Act was passed limiting the period to twenty years; but by some slip it has not been applied in this subsequent Act of Parliament to intestates. So that there again it is a case of omission. It only shews that there has been an omission, but that does not to my mind give an answer to the argument as to the absurdity of holding that the Legislature intended to retain the mortgage and to leave out the personal

C. A. 1882 SUTTON v. SUTTON.

liability. In my opinion the literal meaning is the right meaning, and therefore this action is barred as well as regards the covenant as the right to sue.

COTTON, L.J.:—

This case raises the question whether twelve years is a bar to an action upon a covenant contained in a mortgage deed to recover money. That question arises under the 8th section of 37 & 38 Vict. c. 57. I think the true principle of construing Acts of Parliament and other documents is to see what is the fair and reasonable construction of the words themselves and to apply them accordingly; and if Parliament has used language which does not express what the intention was, it is the duty of Parliament to correct its own language. I think the Courts bring themselves into great difficulties when they attempt to alter the fair meaning of a clause in an Act of Parliament and thus to frame what in their view would have been a better enactment. Where there is an obvious absurdity from reading words in a literal way, and where there are doubtful expressions which may have two meanings, one must not give a construction which will tend to an obvious absurdity, but to my mind there is no absurdity in reading this section grammatically and construing it according to ordinary rules. It reads, "No action shall be brought to recover any sum of money secured by any mortgage," and then it goes on to something else. I think that the words "action or suit" would, of themselves, apply to an action at law as well as to a suit in equity; but I think that the words "at Law or in Equity," although they are not very correctly brought in, do really apply to "actions, suits or other proceedings." Then what have we here? We have an action brought to recover a sum of money which is secured by mortgage, and such an action comes within the express provision of this statute. How then is it sought to be maintained that twelve years is not a bar? One difficulty I have felt has been in consequence of the case of *Hunter* v. *Nockolds* (1) decided by Lord *Cottenham*, in which he expressed an opinion that although in actions brought to recover money issuing out of the lands, only

(1) 1 Mac. & G. 640.

six years' interest could be allowed, yet he based his decision upon this ground, that one must take the two statutes 3 & 4 Will. 4, c. 27, and 3 & 4 Will. 4, c. 42, together. That might be right under the circumstances. He was driven to that by this consideration, that the one Act was only passed three weeks before the other, and therefore he said you must read the two together, and take the later one only as an explanation of the other Act. I think we are not in any such difficulty here, because the section we have to construe is contained in an Act passed in the year 1874, and therefore there is no necessity for construing this so as to leave the same bar to an action on the covenant as that which is provided by section 42 of the earlier Act. There is no necessity to follow in this case the way in which Lord *Cottenham* dealt with the two Acts passed almost simultaneously.

The other ground of contention is this, that this Act was intended to bar actions for the recovery of land, or for enforcing charges thereon. That is the primary object of the Act, but still, although it is an Act having that primary object we find that the clause in question according to its true construction goes beyond that and is not limited in its application to those actions which are the primary object of the Act. I think it would be wrong to hold that this section ought not to have its true construction. In my opinion the true construction makes twelve years a bar to any action upon the covenant, since it is an action to recover money charged upon land. The contention of the Respondent here is that you must treat this as a section preventing you enforcing any charge upon land whether it be by mortgage, charge, or lien. That is not the section, and I do not see how we can alter the language of the section and give it a different meaning from that which I think it bears.

BOWEN, L.J.:—

I am of the same opinion. I think this case falls within the the express words of the Act. I start with this, that sect. 8 of the *Real Property Limitation Act*, 1874, appears to me clearly meant to apply not only to suits in equity, but to actions at law. It may be that the words "at law or in equity" are placed out of their ordinary position. I think that may be so, but whether

C. A. 1882 SUTTON v. SUTTON. Bowen, L.J.

they are placed in their right or their wrong position, it is clear that the section means to deal with actions at law as well as with suits in equity. If the judgment of the Court below is right, to what possible action at law could this section apply? There were two ways of suing at law when there had been a mortgage transaction. One was where there was a covenant upon the express covenant; but if there was no covenant the law presumed an implied promise arising out of the transaction itself to repay the money either at a fixed or an uncertain date, a promise which might, according to the character and construction of the document, be either a simple or a special contract. This particular action is an action of covenant. If this section applies to common law actions, and does not apply to an action of covenant, what does it apply to? It must apply to a common law action on an implied promise. What an extraordinary result would follow if it was decided that the section did not deal with express promises, but dealt with implied promises. What possible ground in reason could there be for putting that interpretation on the plain words of the section? It seems to me that the words themselves are really clear, "No action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage." Does that not mean that no action or suit shall be brought to recover any sum of money which is secured by any mortgage? If that is the true construction, this is a sum of money which is secured by a mortgage and the section does apply. It has been contended by Mr. *Macnaghten* that we are to read it in a non-literal sense, and that the words "sum of money secured by any mortgage," does not mean a sum which is secured, but as if it was "to recover any sum of money so far as it is secured." The first objection to that is that it is not the language of the section, and I think we ought to keep to the plain words of the Act of Parliament where we can. The second objection to it is that it gives no meaning whatever to the word "action," because there was no such thing, so far as I know of, as an action which could be brought to recover a sum of money so far as it was secured.

The preamble of the Act, it is said, shews that the only actions which were intended to be limited in time were actions which related to real property. I do not think that the preamble can

be taken to have cut down the express provisions of the statute, especially as there does not seem to be anything in them inconsistent with the spirit of the Act.

C. A. 1882 SUTTON v. SUTTON.

Solicitors: *Whitehouse & Etherington; Sutton & Ommanney.*

M. W.

WILSON *v.* TURNER.

C. A. 1883 Jan. 16.

[1880 W. 2947.]

Settlement—Maintenance Clause—Power or Trust—Direction to apply the whole or part of Income "for or towards maintenance"—Right of Father to claim Application of Income to Maintenance.

By a marriage settlement certain personal property was settled upon trust for the wife for life, and after her death for the children; and it was declared that the trustees should after the death of the wife apply the whole or such part as the trustees should think fit of the annual income of the expectant share of any child for or towards the maintenance of such child. The trustees after the death of the wife paid the whole income of the trust fund to the husband during the infancy of the child of the marriage without exercising any discretion as to its application to his maintenance:—

Held (affirming the decision of *Bacon*, V.-C.), that there was no absolute trust to apply the income to the maintenance of the children, but a discretionary trust equivalent to a power; and that as the trustees had not exercised any discretion, the estate of the husband must be held liable to repay the whole amount of the income received.

Ransome v. *Burgess* (1) disapproved.

Mundy v. *Earl Howe* (2) commented on.

THE action in this case was brought by *W. J. W. Wilson*, the only child of *William Wilson*, deceased, for the administration of his father's estate, and also for the purpose of setting aside a settlement executed by the Plaintiff at his father's request directly after the Plaintiff came of age.

By the settlement made on the marriage of the testator *William Wilson* with the mother of the Plaintiff, dated the 7th of April, 1855, certain personal property belonging to Mrs. *Wilson* was settled upon trust that the trustees, *J. D. Douglas*, and *A. N. Smith*, should pay the income to Mrs. *Wilson* during her life for her

(1) Law Rep. 3 Eq. 773. (2) 4 Bro. C. C. 224.

C. A. 1883 WILSON v. TURNER.

separate use, and after her death, in the event of her leaving issue of the marriage, should hold the capital, subject as therein mentioned, upon trust for the child or children of the marriage as the husband and wife should appoint, and in default of appointment for the child or children, to be divided between them if more than one equally, and to be paid or transferred to them if sons at their respective ages of twenty-one years, and if daughters, at their respective ages of twenty-one years or marriage. And it was thereby declared that the trustees or trustee should after the death of the wife apply the whole or such part as the said trustees or trustee should think fit of the annual income of the share or fortune to which any child should for the time being be entitled in expectancy under the trusts thereinbefore declared for or towards the maintenance or education of such child, either directly, or to his or her guardians or guardian, without seeing to the application thereof, or requiring any account of the same.

Mrs. *Wilson* died on the 26th of August, 1865. The Plaintiff was the only child of the marriage, and he attained the age of twenty-one years on the 1st February, 1877.

After the death of Mrs. *Wilson* the trustees paid the whole income of the trust property to *William Wilson*. The Plaintiff resided with him and was supported by him, but *W. Wilson* made no request to the trustees that the income should be applied to the maintenance of his son, nor did the trustees exercise any discretion in the matter, but paid the income to the father as though it were his own property.

Soon after the Plaintiff came of age, while he was still living with his father, the whole of the trust property was transferred to *W. Wilson* at the Plaintiff's request; and on the 28th of February, 1877, a deed of settlement was executed by both father and son, by which it was declared that *W. Wilson* should stand possessed of the property in trust to pay £100 a year to the Plaintiff, and to retain the residue of the income for his own use till his death, and after his death upon the trusts therein mentioned.

William Wilson died on the 16th of August, 1880, and the Defendants were his executors.

At the trial of the action on the 24th of February, 1882, Vice-Chancellor *Bacon* gave judgment that the settlement of the 28th

of February, 1877, should be set aside and the trust property restored to the Plaintiff, and that the Plaintiff was entitled to an account against the estate of *William Wilson* for all the income of the trust property received by him since the death of his wife.

From this judgment the Defendants appealed.

Besides the questions as to the validity of the settlement and the application of the income, another question arose on the construction of the will of Mrs. *Wilson's* father, under which she acquired the property, but it was not of a nature to require a report.

Davey, Q.C., and *Mulligan*, for the Appellants:—

We do not contest the judgment of the Vice-Chancellor as to the invalidity of the settlement of 1877, but we object to the estate being called on to account for all the income received since the death of Mrs. *Wilson*. From that time till the Plaintiff came of age he was residing with, and was supported by his father, and the income of the trust property was applicable towards his maintenance. The maintenance clause in the settlement of 1855 was not a mere power, but a trust, and the trustees were bound to apply the income for that purpose. A formal demand on the part of the father is immaterial. *Ransome* v. *Burgess* (1) is distinctly in our favour. There the clause was almost identical with the present. It is part of the contract with the husband that the income should be so applied. That is the foundation of the decisions on this subject. The words "for or towards" do not indicate a discretion in the trustees. They occur in many of the cases where the trust has been enforced: *Mundy* v. *Earl Howe* (2), *Meacher* v. *Young* (3); *Stocken* v. *Stocken* (4); *White* v. *Grane* (5); *In re Weaver* (6).

Marten, Q.C., and *Owen*, for the Respondent, were not called on.

JESSEL, M.R., after deciding the question of construction, said:—

The other point relied upon, were it not for the decided cases, would in my opinion be wholly unarguable. This clause in the

(1) Law Rep. 3 Eq. 773.
(2) 4 Bro. C. C. 224.
(3) 2 My. & K. 490.
(4) 4 Sim. 152; 4 My. & Cr. 95.
(5) 18 Beav. 571.
(6) 21 Ch. D. 615.

C. A. 1883 WILSON v. TURNER. Jessel, M.R.

settlement is a direction in the ordinary form, to do what? To apply the whole or such part as the trustees think fit for or towards the maintenance of the children. It is said that this is a contract with the father as part of the settlement, and that it has been so decided in *Mundy* v. *Earl Howe* (1). The decision referred to went a step further. It laid down that it was not only a contract with the father, but it was a contract which entitled the father to get rid of the rule of equity which said that a power or trust for the maintenance of the infants was to be exercised and used with a view to the benefit of the infants and not for the benefit of the father, and therefore if the father were able to maintain the children it was not intended to relieve him from the liability so to do. That was held no doubt in the first case under a will; the benefit that the testator meant was a benefit to the child upon principle. But it is difficult to see how the construction of a marriage settlement can be different from that of a will. It is not only the father who takes the benefit of the settlement, but the children also, and indeed they are the primary objects of the trust: the trust is for them in the first instance, and then there is superadded a power or trust for maintenance. That is as much for the benefit of the children under a settlement as under a will, and it is very difficult to see how because the father happens to be a party to the instrument which creates this kind of trust in favour of the children it can alter the construction of the trust—because that is the result of *Mundy* v. *Earl Howe*—by saying it is an absolute trust for their maintenance irrespective of the ability of the father. That decision has been commented on several times, notably by Vice-Chancellor *Kindersley* in *Ransome* v. *Burgess* (2), and by Vice-Chancellor *Malins* in *In re Kerrison's Trusts* (3), and I think their criticisms are well founded. On the other hand, considering the number of times *Mundy* v. *Earl Howe* has been recognised in this Court, it is quite impossible for this Court now to say that that case is not law and not binding upon it. But it does appear to me, having regard to the dissatisfaction of so many Judges, and considering the effect of that decision, that it is not part of

(1) 4 Bro. C. C. 224. (2) Law Rep. 3 Eq. 773.
(3) Law Rep. 12 Eq. 422.

our duty to carry it any further. It comes therefore to this—when you look at the decision—it is a decision that a trust to apply the whole or part as the trustees may think fit of the income for the maintenance of the children is an obligatory trust and compels the trustees to maintain the children where that trust occurs in the marriage settlement to which the father is a party. In that case you can compel the trustees to apply an adequate portion of the income. But where we have, as we have in this settlement, not only a choice on the part of the trustees to apply "the whole or such part of the income" as they think fit to the maintenance of the children, but to apply it "for or towards" the maintenance, you have what I may call a double option. They were not bound to apply any part for maintenance. The result is, that in my opinion the trust is one of those trusts which is equivalent to a power; there is nothing that you can compel them to do, and that being so, it seems to me on principle that we are not bound by the authorities to put a different interpretation upon the words, that there is no compulsion upon the trustees to apply a sufficient sum to maintain the infant, because they are not bound to maintain it at all. This distinguishes this case from *Stocken* v. *Stocken* (1) and *Meacher* v. *Young* (2). In those cases there was a trust to apply the whole of the income towards the maintenance of the children. When you have a trust to apply the whole of the income, whether it is "for the maintenance" or "towards the maintenance," that is a compulsory trust, and you can take the whole income either for one purpose or the other. Therefore it appears to me that those cases are no authority at all as regards the case before us.

But there is one case which appears to me to be on all fours with this, I mean *Ransome* v. *Burgess* (3). There the words were undistinguishable from the words in the present case. There are two points to be considered. *Ransome* v. *Burgess* is not the decision of a Court which is binding upon this Court. But on the other hand, it is the decision of a very careful and eminent Judge, and is entitled to very great attention. It was decided as long ago as 1866, and if it had affected the course of the

(1) 4 Sim. 152; 4 My. & Cr. 95. (2) 2 My. & K. 490.
(3) Law Rep. 3 Eq. 773.

C. A. 1883 WILSON v. TURNER. Jessel, M.R.

practice of conveyancing or altered some settled point of law, I should have had great difficulty in disagreeing with it. But it has done neither the one nor the other. So far as I know this case is not referred to as an authority for what is otherwise than the law. Then there is another observation to be made. In *Ransome* v. *Burgess* (1), as appears from the report, both in the authorized reports and in the *Law Journal* (2), this point was not argued, and was not decided by the Judge, and indeed when he sums up the case, he states it thus (3): "If the language of the settlement is so framed as to express a trust to apply the income or any part of the income in maintaining the children, although the *quantum* of income to be so applied is left to the discretion of the trustees, the father is entitled to have whatever is proper and necessary for the maintenance of his children applied for that purpose without reference to his ability to maintain them; but if the language of the settlement expresses merely a power so to apply the income or any part thereof to the maintenance of the children, then the father is not so entitled." So that, as he states it, he takes it to be clear in the case before him that it was a trust, as he had already stated in a former part of his judgment, exactly like the case of *Mundy* v. *Earl Howe* (4).

Having therefore regard to this point having escaped notice, and to the decision of the Court, and having regard to the other points which I have mentioned, I think we are not bound to follow the decision in *Ransome* v. *Burgess*, and that decision is not supported by the authority of *Mundy* v. *Earl Howe*, and is not supported by any independent principle. That being so, it appears to me that the conclusion of the Vice-Chancellor was right.

As regards the facts, they are admitted. The whole income was paid to the father without any regard to the question of maintenance, and there is no evidence that the father was not able to maintain his children. That being so, it appears to me that the father cannot establish a claim against the trust fund in respect of the maintenance of his child, and that the decision of the Vice-Chancellor must on both points be affirmed.

(1) Law Rep. 3 Eq. 773.
(2) 36 L. J. (Ch.) 84.
(3) Law Rep. 3 Eq. 780.
(4) 4 Bro. C. C. 224.

LINDLEY, L.J., after considering the question of construction, said:—

As regards the second point, the claim for an allowance for maintenance, I confess if I had been a Judge of the first instance I should probably not have thought it right to depart from the decision of Vice-Chancellor *Kindersley* in *Ransome* v. *Burgess* (1). The question which arises must be looked at from two points of view—first, what is the principle, and secondly, how it has been applied. I understand the principle to be, that we must look at every clause that comes before us in order to see whether there is a trust for the maintenance of the children such as would enable the father to insist on the trust fund being applied for the maintenance of the children, although he is himself able to maintain them. If there is such a trust he is entitled to have the children maintained out of the trust fund, if there is no such trust he is not.

Therefore, the preliminary question is, what is the language of the clause which it is said creates a trust for the maintenance of the children? Now, when I look at it quite apart from any authority, and see the wording of it, I confess that neither I nor, I apprehend, anybody else could say that this was a plain trust for the maintenance of the children. It runs in this way, reading it shortly, it declared that the trustees should (so far it looks like a trust) after the decease of the wife apply the whole or such part as they should think fit of the annual income for or towards the maintenance of the children. Let us see how, under those words, apart from authority, it could be said, consistently with the language, that it was the duty of the trustees to apply any part of this fund to maintain the children. I think it would be doing violence to the language to say that this was a trust obliging the trustees so to apply the fund; and if it were not for authority I should be content to stop there and say I cannot so read this clause.

Now when we look into the authorities we shall find that they do not present any difficulty, apart from the case of *Ransome* v. *Burgess*. The first case of *Mundy* v. *Earl Howe* (2) was not

(1) Law Rep. 3 Eq. 773. (2) 4 Bro. C. C. 224.

C. A. 1883 WILSON v. TURNER. Lindley, L.J.

like the present case, it was a peculiar case. The husband had been already married and had six children by the first wife. On the settlement made on the second marriage the clause which Lord *Thurlow* had to construe was inserted, and, having regard to the facts under which the second settlement was made, he held that there was a trust for the maintenance of the children. The clause, though something like this clause, was worded differently. The two following cases, *Meacher* v. *Young* (1) and *Stocken* v. *Stocken* (2), do not appear to present any difficulty.

Then when you come to the case before Vice-Chancellor *Kindersley* (*Ransome* v. *Burgess* (3)), I confess I am unable to distinguish that case from the present. But then he did this, he extended, and in my opinion erroneously extended, the previous decisions. Taking the principles correctly, and enunciating them correctly, he put a construction on the clause which I confess I do not think the words warranted; and I decline to be a party to extending the rule he followed.

In order to shew that I am right in saying that the previous cases had gone far enough, or too far, I will refer to Lord *Cottenham's* language in *Thompson* v. *Griffin* (4), in which he expressly said so, and I may, with reference to that, and to indicate the general opinion of the profession, refer to Mr. *Lewin's* Book on Trusts (5), in which he says the cases are generally considered to have gone far enough. I go farther. In *In re Kerrison's Trusts* (6), which came before Vice-Chancellor *Malins* in 1871, in which the clause was worded almost exactly like the clause in *Ransome* v. *Burgess*, the Vice-Chancellor laid hold of a distinction, and said that *Ransome* v. *Burgess* was a case of an ante-nuptual settlement—that it was a contract. He did not think that that authority ought to govern any case which it did not strictly cover. I do not pretend to distinguish this case from the case before Vice-Chancellor *Kindersley*. I think he went too far in that case, and I do not feel disposed to follow him. I accept and apply the principle he laid down; but I think we shall not be doing wrong

(1) 2 My. & K. 490.
(2) 4 My. & Cr. 95.
(3) Law Rep. 3 Eq. 773.
(4) Cr. & Ph. 317.
(5) 7th Ed. p. 509.
(6) Law Rep. 12 Eq. 422.

in declining to give effect to the very ingenious argument which has been addressed to us.

C. A. 1883 WILSON v. TURNER.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors: *Rees Davies & Co.; Smiles & Co.*

M. W.

Ex parte RITSO. *In re* RITSO.

C. A. 1883 Jan. 25.

Bankruptcy—Rehearing—Limit of Time—Refusal of Adjudication—Debtor's Summons—Judgment Debt—Statement of Consideration—Amendment of Petition—Affidavit—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 71—*Bankruptcy Rules*, 1870, *r.* 143—*Rules of Court*, 1875, *Order* LVIII., *r.* 15.

Though as a general rule a rehearing of a bankruptcy matter ought not to be allowed after the expiration of the time limited for appealing from the order, yet, there being no time fixed by the Act or the Rules for applying for a rehearing, the Court will on special grounds allow a rehearing when it is applied for after the expiration of the time for appealing, even when the application is to rehear a bankruptcy petition which has been dismissed.

But, *semble*, that an application for a rehearing should not be made *ex parte*.

When a debtor's summons is founded on a judgment debt it is not necessary to state the consideration for the judgment in the summons, and a mistatement of the consideration will not vitiate the summons.

When a bankruptcy petition is amended under an order of the Court the Judge has a discretion as to requiring the amendment to be verified by affidavit, and if the alteration is an immaterial one an affidavit will not be required.

THIS was an appeal against an adjudication of bankruptcy made by Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, against *F. G. Ritso*.

On the 26th of July, 1882, *Benjamin Humphrey*, who was the trustee in the liquidation of *Brown, McMahon, & Co.*, issued a debtor's summons against *Ritso* for the sum of £585 4*s.* 2*d.* The summons stated that the amount was claimed "for debt, interest, and costs on a judgment obtained in the Exchequer Division of the High Court, dated the 24th of November, 1881, the consideration being for money lent and advanced by the liquidating debtors

C. A. 1883 *Ex parte* RITSO. *In re* RITSO.

to you at your request, and for money paid by them for you at your request between the 9th of September, 1880, and the 12th of December, 1880." *Ritso* failed to comply with the summons within the time limited for his doing so, and on the 4th of September *Humphrey* presented a bankruptcy petition against him, alleging as an act of bankruptcy the non-compliance with the debtor's summons. The petition stated the judgment, and the consideration for it, in the same way as they were stated in the debtor's summons. The statements contained in the petition were verified by affidavit in the usual way. The petition was afterwards amended, in pursuance of leave given by the Registrar on the 19th of October, 1882, by stating the consideration for the judgment debt as being "a promissory note, dated the 9th of September, 1880, for £527, given by the said *F. G. Ritso* to Messrs. *Brown, McMahon, & Co.* as an acknowledgment for moneys lent and advanced by the said *Brown, McMahon, & Co.* to the said *F. G. Ritso* at his request prior to the 9th of September, 1880." No fresh affidavit was filed to verify the statement contained in the amended petition. The petition thus amended was heard on the 26th of October, 1882, and was dismissed by the Registrar, on the ground that no act of bankruptcy was proved, because the consideration for the judgment was not correctly stated in the debtor's summons. No notice of appeal from this decision was given, but on the 16th of November, 1882 (the last day for giving notice of appeal), counsel for the petitioning creditor applied *ex parte* to the Registrar for a rehearing of the petition. The Registrar had come to the conclusion that he had been in error in dismissing the petition, and he granted the application and fixed the 30th of November for the rehearing. No formal order was drawn up, but a memorandum of the appointment, initialled by a clerk of the Registrar, was made in the written note of the application which was placed on the file of the proceedings. The petition was not reheard on the 30th of November, but on that day the petitioning creditor served on *Ritso* a notice that the 6th of December, 1882, had been appointed by the Registrar for the rehearing of the petition. The petition was reheard on the 9th of December, and an adjudication was then made. *Ritso* appealed.

Winslow, Q.C., and *Doria*, for the Appellant:—

As a general rule a rehearing will not be granted after the expiration of the twenty-one days limited for appealing: *Ex parte Brown* (1). Some special grounds ought to be shewn, and none were shewn in the present case. The rule ought to be applied most strictly in cases of adjudication. If a petition is dismissed and the time for appealing is allowed to elapse, persons are entitled to trust the debtor on the faith of his being free to deal with them. A rehearing ought not to be granted on an *ex parte* application.

[JESSEL, M.R.:—That is a matter of discretion. I have known such orders made *ex parte*. I should infer from the report of *Ex parte Brown* that the application for a rehearing in that case was made *ex parte*. And in *Parmiter* v. *Parmiter* (2) and *Markham* v. *Markham* (3) the Court of Appeal gave leave *ex parte* to a person not a party to an action to appeal from an order made in it. The Court of Appeal has power to extend the time for bringing an appeal.]

Only on special grounds. No new evidence was before the Registrar. This Court would not allow an appeal to be brought after a lapse of five weeks, when no surprise or bad faith on the part of the Respondent was shewn.

[JESSEL, M.R.:—The Judge has exercised his discretion, and you must shew that there has been a gross miscarriage.

BOWEN, L.J.:—It would be a strong thing to interfere with the exercise of a Judge's discretion when he says, "I have made a blunder, and I wish to set it right." The discretion is not likely to be abused in that way.]

No order was drawn up when the leave was given on the 16th of November. The informal memorandum initialed by the Registrar's clerk is not enough.

[JESSEL, M.R.:—It is an order of the Court. I agree that it would be better not to give leave for a rehearing *ex parte*, I should

(1) Law Rep. 9 Ch. 304. (2) 2 D. F. & J. 526.
(3) 16 Ch. D. 1.

C. A. 1883 *Ex parte* RITSO. *In re* RITSO.

never do it myself. The practice, however, is not settled. But I think there was enough on the file of proceedings in the present case to give notice of the rehearing to any one who searched it.]

Another objection to the debtor's summons is that the consideration for the judgment was erroneously stated in it. And there is this further objection, that the amendment in the petition was not verified by affidavit. The original affidavit ought to have been resworn, or there should have been a new one.

[JESSEL, M.R.:—There is no rule which requires that; it must be a matter of discretion, depending on the nature of the amendment.

Herbert Reed, for the petitioning creditor:—

This objection was not taken before the Registrar.

JESSEL, M.R.:—There is nothing in it.]

The evidence shews that there was no consideration for the judgment, and therefore there is not a good petitioning creditor's debt.

Herbert Reed, for the Respondent, was not heard.

JESSEL, M.R., after saying that no sufficient case had been established for impeaching the judgment, and that therefore there was a good petitioning creditor's debt, continued:—

Another point has been taken which is wholly insufficient. It is said that the debtor's summons is to go for nothing, because in it the consideration for the judgment was wrongly stated. It was stated to be money lent to the debtor, instead of, what it was in fact, a promissory note given for money lent. It is the merest technicality in the world. The ultimate consideration was the money lent, though, no doubt, the legal consideration was the promissory note. But what is the effect of the misstatement? There is no law requiring the consideration for a judgment debt to be stated in a debtor's summons. The judgment debt is the debt due, although, no doubt, in bankruptcy the judgment can be disregarded if it is shewn that there was no consideration for it.

C. A.
1883
Ex parte RITSO.
In re RITSO.
Jessel, M.R.

But this does not make the summons wrong because the consideration is wrongly stated in it.

Another objection arises in this way. The petition stated the consideration for the debt in the same way as it was stated in the summons. The petition was afterwards amended by leave of the Court, and no fresh affidavit was made to verify the amendment. Well, there is no rule requiring a fresh affidavit. The judge has a discretion, and of course he would not require a fresh affidavit, if only an immaterial alteration had been made in the petition. But this objection ought to have been taken in the Court below. It was not taken there, and we cannot allow it to be raised now.

I come now to the only important objection. The petition was originally heard by the Registrar on the 26th of October, and he dismissed it. He made a mistake in his decision, and this was brought to his attention on the 16th of November, the last day for giving notice of appeal, and he then on an *ex parte* application gave leave to have the petition reheard, and fixed the 30th of November for the rehearing. It was, in fact, reheard on the 9th of December, more than a fortnight after the time for appealing had elapsed. The question is whether the rehearing was too late. This matter was considered by the Court of Appeal in *Ex parte Brown* (1). They noticed the fact that no limit of time is fixed by the Act or the Rules for presenting a petition of rehearing. But they said that the Court must be careful not to allow a man to escape from the rule which limits the time for appealing, by granting a rehearing as a matter of course. The decision, however, laid down no hard and fast rule, though the Court said that as a general rule they would, in granting a rehearing, be guided by the analogy of the time for appealing. In that case they held that the delay had been too long. It was a delay of several months; in the present case there was a lapse of only a few days. And we must also recollect that under the *Judicature Act* the Court of Appeal has power to extend the time for appealing under special circumstances. So that, if we adopt the analogy of an appeal to its full extent, still the time may be extended on special grounds. Now what happened in the present

(1) Law Rep. 9 Ch. 304.

C. A. 1883 *Ex parte* Ritso. *In re* Ritso Jessel, M R.

case? The Registrar came to the conclusion that he had made a blunder, and he wished to set it right. We may trust Judges not to grant a rehearing too readily on such a ground as that. Then another rule which has been laid down is this, that, when a Judge of first instance has exercised his discretion, the Court of Appeal will not interfere, unless there has been a gross miscarriage; I think "a very plain miscarriage" would be a better term. In my opinion in the present case, not only has there not been a plain miscarriage, but there has been no miscarriage at all. I think there is no ground for saying that the rehearing was too late. I quite agree with Mr. *Winslow* that in matters relating to adjudications of bankruptcy we ought to be very careful about allowing a rehearing after a petition has been dismissed, because persons may be induced to deal with the debtor on the faith of the petition having been dismissed, and no appeal having been presented within the time allowed for that purpose. But even that objection is met in the present case by the memorandum of the appointment of a day for the rehearing which was placed on the file of proceedings, so that anyone, who was searching the file with the view of discovering whether he might safely give credit to the debtor, would have seen the memorandum, and would thus have had notice of the rehearing in due time. No third party could have been injured by the rehearing. I do not, however, wish to lay it down as a general rule that, if the application for a rehearing is delayed for a few days beyond the time for appealing, it ought to be refused, though of course the delay would be a circumstance to be taken into consideration. I think the decision of the Registrar in the present case was right.

Lindley, L.J.

I am of the same opinion. On the question whether the notice of the rehearing was too late I do not wish to add anything. As to the judgment, it is true that in bankruptcy a judgment is not conclusive, but this does not mean in every case the consideration for the judgment must be stated. It only means that if the debtor can impeach the judgment he will be allowed to do so. But *primâ facie* the judgment stands. And, as to the amendment of the petition, it does not appear to me that it affected the

substance of the case, and it would be absurd to say on that ground that an act of bankruptcy has not been committed. I think the adjudication was rightly made at last.

C. A. 1883 *Ex parte* RITSO. *In re* RITSO.

BOWEN, L.J.:—

I am of the same opinion.

Solicitor for Appellant: *S. B. Somerville.*
Solicitor for Respondent: *T. Allingham.*

W. L. C.

In re WACHER.

C. A. 1882 *Dec.* 19, 21.

Trustee Act, 1850, s. 5 [*Revised Ed. Statutes, vol. x. p.* 984]—*Stock standing in the Name of Testator—One of several Executors a Lunatic.*

Where one of three executors of the surviving executor of a testator was of unsound mind an order was made under the 5th section of the *Trustee Act*, 1850, giving the right to transfer a sum of stock belonging to the estate of the original testator, although the stock still remained standing in the name of the original testator.

JOHN HARRIS made his will in May, 1867, and thereby bequeathed his personal estate to his wife for life, and after her death to his children in equal shares, and appointed two persons, of whom *Thomas Wacher* was the survivor, his executors. Both the executors proved the will.

The testator left two children, of whom *W. H. Harris* was the survivor, and he was also administrator of his deceased brother. *Thomas Wacher*, the surviving executor, died in January, 1868, having by his will appointed his sons *W. Wacher*, *J. J. Wacher*, and *Joseph Wacher*, his executors, all of whom proved his will.

In 1868 *Joseph Wacher* became of unsound mind, though not so found by inquisition.

The only part of the testator's estate which remained undistributed was a sum of £346 New £3 per Cent. Annuities, still standing in the name of the original testator *John Harris*.

W. H. Harris, who was absolutely entitled to the fund, and *W. Wacher* and *J. J. Wacher* the two executors who were not of

C. A. 1882 *In re* WACHER.

unsound mind, now presented a petition in Lunacy under the *Trustee Acts* praying that the right to call for a transfer of and to transfer the sum of £346 New £3 per Cents. might vest in *W. Wacher* and *J. J. Wacher*.

Plummer, for the Petitioners, referred to sect. 5 of the *Trustee Act*, 1850.

[COTTON, L.J.:—Can the order be made under that section? That section appears to refer only to stock standing in the names of the trustees, one of whom is of unsound mind; but in the present case it is standing in the name of the testator.]

Plummer submitted that the executors were persons entitled to the stock within the meaning of the section. He referred to *In re White* (1).

COTTON, L.J.:—

On the authority of that case you may take the order.

BOWEN, L.J., concurred.

Solicitors: *Speechly, Mumford, & Co.*, agents for *Plummer & Fielding, Canterbury.*

(1) Law Rep. 5 Ch. 698.

M. W.

ATTORNEY-GENERAL *v.* GASKILL.

V.-C. B.

1882

July 27; *Aug.* 2; *Nov.* 21, 22.

[1880 A. 1233.]

Local Board—Contract under Seal—Agreement to compromise—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 173, 174.

An agreement between a local board and a person, against whom an action to restrain his interference with a public highway had been commenced by the local board, that the action should be settled by his paying the costs of the board (which exceeded £50), and undertaking not to build on the unbuilt land, the board agreeing not to proceed further as to pulling down the obstruction, is not a contract within the *Public Health Act*, 1875, necessary for carrying the Act into execution (sect. 173) so as to require to be sealed with the common seal of the local board under sect. 174; and therefore such agreement, though not under seal, is capable of being enforced by the board.

PREVIOUSLY to June, 1880, land at *Long Eaton*, which was traversed by a highway or public footpath, was laid out for building purposes, and it was proposed by the owner or lessee to form a street on each side of the path. The owner shortly afterwards sold to the Defendant a portion of the land, and thereupon the Defendant, on the 17th of June, 1880, caused the *Long Eaton* Local Board, as the urban sanitary authority, to be served with notice of his intention to erect nine houses in the proposed street, and afterwards furnished their surveyor with a block plan, from which it appeared that some of the intended buildings would interfere with the footpath. The deposited plans were passed by the board "subject to the public footway being left open in its original line," and the Defendant proceeded with the erection of his houses. On the 12th of August, 1880, the Defendant received notice from the building committee of the local board that as some portion of his buildings were an encroachment on the original line of the public footpath, such buildings must not be proceeded with any further until he had taken down and removed such portion of the building as now stood on the line of the footpath, and that the same must be removed within forty-eight hours. The Defendant attended at a meeting of the local board and asked permission to divert the public footpath so as to render it

V.-C. B. 1882

ATTORNEY-GENERAL v. GASKILL.

unnecessary to pull down the building which he was then erecting upon it, but the board, having no power to authorize either the obstruction or the diversion of the footpath, declined to give such permission.

After some further proceedings, in the course of which the Defendant had forcibly prevented workmen sent by the local board from removing the obstruction complained of, the local board on the 12th of November, 1880, issued the writ in this action for the purpose of restraining the Defendant from erecting or allowing to remain any house or building upon any part of the public footpath not then built upon until the footpath should have been diverted by lawful authority, and from obstructing the free use of the said public footpath, or any part thereof.

An interim injunction was shortly afterwards applied for, but the application was directed to stand over upon an undertaking by the Defendant to keep matters *in statu quo* until the trial.

On the 29th of November, 1880, the Defendant and his solicitor met the Plaintiffs' solicitor and some conversation took place as to the terms on which the action should be settled, the Defendant proposing that each party should pay their own costs, but this was objected to by the Plaintiffs' solicitor, who insisted that the Defendant should pay all the Plaintiffs' costs of the action. Later on in the same day, in the absence of the Defendant's solicitor, some further discussion took place between the Defendant and Plaintiffs' solicitor, and afterwards in the board room, which resulted in the following agreement:—

"Mr. *Newman*, chairman, 29th November, 1880.

"(Members of the board present).

"Mr. *Gaskill* (Defendant) attended before the board and made an offer to the board to settle the action, viz., each party to pay their own costs, and he would undertake not to build on unbuilt land until road diverted by legal authority. He subsequently agreed to settle the matter by paying the costs of board and undertaking not to build on unbuilt land.

"(Signed) *William Gaskill.*

"Agreed board not to further proceed as to pulling end house down. (Signed) *J. Black*, for Local Board, *Long Eaton.*"

The Plaintiffs' costs exceeded £50, and the Defendant refused to perform his part of the agreement, alleging that he had been distinctly told by the Plaintiffs' solicitor that if the action were then stopped the Plaintiffs' costs would not be more than £30; that he had signed the agreement without reading it over or having it explained to him, under pressure put upon him by the chairman, who recalled him just as he was leaving the room in order to catch a train; and also that he signed on the faith that the agreement represented what he had in fact agreed to, viz., that the action should be settled on terms to be arranged with his solicitor, and that if he had to pay the Plaintiffs' costs they would not in any event exceed £30.

The Plaintiffs had since amended their statement of claim by stating the agreement of the 29th of November, 1880, and claiming an injunction to restrain the Defendant from erecting any house or building upon any part of the highway or public footpath which was not at present built upon until such highway or public footpath should have been diverted by lawful authority, the Plaintiffs being willing and thereby offering (the Defendant paying their costs of this action according to his agreement) not in the meantime to take any further proceedings to compel the Defendant to pull down the house in the memorandum of agreement called the end house which had been partly erected upon the said highway or footpath; or in the alternative to restrain the continuance of any obstruction or interference with the footpath, as originally claimed.

At the trial of the action, the evidence, the effect of which is stated in the judgment, and the arguments were directed to the question of what took place in reference to the signing of the memorandum of agreement of the 29th of November, 1880, and to the legal effect of such memorandum.

Horton Smith, Q.C., and *Speed*, for the Plaintiffs.

Marten, Q.C., and *J. G. Wood*, for the Defendant:—

The Plaintiffs are not entitled to specific performance of the memorandum of the 29th of November, 1880, which, as a contract not under seal on behalf of a corporation or public body, is void

V.-C. B. 1882 ATTORNEY-GENERAL v. GASKILL.

both by the general law which requires that contracts by a corporation or public body must be under seal, for the purpose of authenticating the concurrence of the whole body corporate: *Copper Miners Company* v. *Fox* (1); *Mayor of Ludlow* v. *Charlton* (2); *Mayor of Kidderminster* v. *Hardwick* (3); and also by the provisions of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), ss. 173, 174, which are imperative and not directory only, and are of general application and not limited to contracts specially mentioned in the section, so that the want of a seal is a complete bar to any contract for or relating to a sum exceeding £50: *Hunt* v. *Wimbledon Local Board* (4); and this rule applies not only to an executory but also to an executed contract: *Young & Co.* v. *Leamington Corporation* (5). But assuming that the want of a seal is not a fatal objection, then we submit that the agreement which was extorted from the Defendant by pressure, and without time for consulting his solicitor, cannot be enforced, and that the Plaintiffs after the delay in bringing forward their case, whereby the Defendant was misled and allowed to alter his condition under the belief that he was not bound by the agreement, are too late in their claim for specific performance. We also say that the agreement was signed by the Defendant on the assurance and in full belief that the sum to be paid by him in respect of the Plaintiffs' costs of action would not exceed £30; and where there has been substantial misapprehension as to the subject-matter of the contract, or where one of the contracting parties swears that he understood the contract in a different sense to what the other did, the Court will refuse to enforce specific performance against a Defendant so swearing, and, in fact, so proving: *Malins* v. *Freeman* (6); *Wycombe Railway Company* v. *Donnington Hospital* (7).

Horton Smith, in reply:—

The cases relied on on behalf of the Defendants, *Hunt* v. *Wimbledon Local Board* and *Young & Co.* v. *Leamington Corporation*, were cases of executory contracts necessary for carrying into

(1) 16 Q. B. 229.
(2) 6 M. & W. 815.
(3) Law Rep. 9 Ex. 13.
(4) 3 C. P. D. 208; 4 C. P. D. 48.
(5) 8 Q. B. D. 579.
(6) 2 Keen, 25.
(7) Law Rep. 1 Ch. 268.

execution the *Public Health Act*, 1875. All such contracts, the nature of which is shewn by sect. 174, must be in writing and sealed with the common seal of the urban authority; and as the Act is mandatory and prevents any contract for an amount exceeding £50 from being entered into under the Act except under seal, it was held that there was no contract for equity to enforce: *per Cotton*, L.J. (1). But this is not in any sense a contract necessary for carrying the Act into execution, but a mere contract between the parties for settling an action upon terms, and therefore it does not require to be sealed for the purpose of making it a valid contract, though the common seal might be necessary for the purpose of evidencing the contract, so as to satisfy the requirements of the *Statute of Frauds*. Assuming, however, that the *Public Health Act*, 1875, sect. 174, applies to such a contract as this, it is an executed contract, and there has been part performance by the Plaintiffs, who, by abstaining from further proceedings as to pulling down the end house, have fulfilled the obligations on their part, such as would enable a Court of Equity to interfere by preventing the provisions of the statute being set up by the Defendant in repudiation of his own part of the contract of which he has had the benefit: *Ungley* v. *Ungley* (2); *Melbourne Banking Corporation* v. *Brougham* (3). Even at Common Law a corporation might have sued and recovered upon an executed contract though not under seal: *Beverley* v. *Lincoln Gas Company* (4); *Australian Royal Mail Steam Navigation Company* v. *Marzetti* (5). The contract between the parties being complete and final, an intention that it should be put into a more formal and professional shape by a solicitor does not render it conditional so as to entitle either party to resile from it: *Rossiter* v. *Miller* (6); *Lewis* v. *Brass* (7). As to the alleged mistake, the Defendant could not have supposed that the costs would be covered by £30, and no undertaking to that effect was given by the Plaintiffs' solicitor, who distinctly states that what he told the Defendant was that the costs would not be less than £30. And where, as in this case,

(1) 4 C. P. D. 60, 61.
(2) 5 Ch. D. 887.
(3) 4 App. Cas. 156.
(4) 6 A. & E. 829.
(5) 24 L. J. (Ex.) 273.
(6) 3 App. Cas. 1124.
(7) 3 Q. B. D. 667.

V.-C. B. 1882

ATTORNEY-GENERAL v. GASKILL.

there has been no misrepresentation, the Defendant cannot be allowed to evade performance of his contract by simply saying that he made a mistake, into which he was led solely by his own negligence: *Tamplin* v. *James* (1).

Marten replied upon the cases cited in reply.

BACON, V.C., after stating the case, and observing that upon the case raised by the Defendant, that he never undertook to pay more than £30 for the Plaintiffs' costs, the weight of evidence was certainly against the contention of the Defendant, proceeded:—

Then the question that presents itself is whether the contract is within the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), or not? The first enactment on this subject is sect. 173: "Any local authority may enter into any contracts necessary for carrying this Act into execution." Reading the Act through to see the purposes for which the local authority is established, I find there are powers to abate nuisances, to make sewers, to do a variety of other things, and amongst others to levy rates for the payment of expenses necessarily incurred. Can it be said with any reason that this agreement into which two parties litigant entered in the face of this Court is a contract "necessary for carrying this Act into execution." In my opinion there is no pretence whatever for saying so. Sect. 174 is: "With respect to contracts made by an urban authority under this Act . . . every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority." It is impossible to ascribe any kind of value to the subject of this contention. It is not for money, it is not for the value of goods, or for anything else; it is an agreement relating to the suppression of a nuisance—for that purpose and that only; and, in my opinion, it is not within the provisions of the *Public Health Act*, and there is no foundation for the objection which has been argued out at such great length and with reference to such abundance of authorities. This is like the case of an action between *A.* and *B.* only, who, while the action is pending, come to an agreement, not for the purpose of carrying the Act into execution, but for the

(1) 15 Ch. D. 215.

purpose of settling the differences which existed between them, and they agree upon the terms, and the Plaintiffs, as I may call them—these relators—are willing to be bound by the terms. They have performed them as far as forbearing, because of this agreement, to exercise what they thought was a right, or at all events to enforce the law which they thought they had a right to invoke. In my opinion that is a perfectly valid agreement, which required no seal, for it was not for doing anything to carry into effect the purposes of this Act—for carrying this Act into execution. It was not a contract for any value, whether above or below £50, but it was a contract which the Plaintiffs had a right to enter into, and having entered into it, and the Defendant having also entered into it, I think that ought to have put an end to the action and no further proceedings ought to have been had in it. Now the present claim before me presents that as the first object. It asks in terms that the nuisance of which the board complain shall be abated by granting an injunction restraining the Defendant from continuing that nuisance, *i.e.*, "from building upon any part of the highway or public footpath which is not at present built upon, until the footpath shall have been diverted by lawful authority; the Plaintiffs being willing to enter into an undertaking not in the meantime to take any further proceedings to compel the Defendant to pull down the house in the agreement mentioned which has been partly erected." That is in other words to carry into effect that agreement which has been entered into. Now, the Defendant has resisted the performance of that agreement on various grounds. He asserts that in his conversations with Mr. *Black* he had reason to believe, and did believe, that no more than £30 would have been exacted from him for costs. And he says that at the meeting he was taken by surprise; that he desired to consult his solicitor and had not an opportunity of doing so; that he was kept there so long that he lost his train and had to walk home. That he calls duress and surprise. Every one of the persons present at that meeting has been examined as a witness, and they all agree that the Defendant came to the board with the intention of inducing them to put an end to the litigation. The terms were discussed; sufficient time was occupied in the discussion. It is impossible to suggest that the Defendant, an

V.-C. B. 1882 ATTORNEY-GENERAL v. GASKILL.

adult man, an artisan employed in this work which he was then engaged upon, did not understand every part of it. But what he says only is that he thought he was not to pay more than £30, and he had not an opportunity of consulting his solicitor. This was a transaction in which the assistance of a solicitor was not necessary. It was perhaps necessary, if any further document should be prepared, if anything should be more formally executed between the parties that a solicitor should be employed, and that the Defendant should not execute any deed that the solicitor did not approve of. But the terms of the bargain were then agreed to—that is proved beyond possibility of contradiction—so that upon that part of the case, in my opinion, the Defendant's case wholly fails; and unless this is a contract within the meaning of the Act of Parliament, the Defendant has no defence whatever to the demand which is made against him to perform that agreement, not to do anything actively, but to submit to an injunction restraining him from continuing that nuisance, which injunction, under the authority of the Act of Parliament, the local board have instituted proceedings to obtain, and which they only forebore to enforce because of his submission to the terms of the agreement, which was then entered into between them. If that is so, it is unnecessary to proceed further. Whether the original injunction should be granted or not, is not now a question. The parties themselves, it happens in this case as it does happen in a great many cases, having had enough of the litigation, where it had not ripened for a decision, agree that they will put an end to it upon terms. That is no "contract necessary for carrying this Act into execution." It is no contract which the corporation, who are Plaintiffs in this action, are prevented from entering into in the matter relating to the action in which they are Plaintiffs, and in my opinion, therefore, they have a right to the injunction which they asked for.

Solicitors: *Taylor, Hoare, & Taylor*, agents for *John Black, Nottingham; F. Needham*, agent for *Burton, Son, & Eking, Nottingham.*

F. G. A. W.

In re HAYGARTH'S TRUSTS.

V.-C. B.

1882
Dec. 5.
1883
Jan. 13.

Duty on Letters of Administration — Cesser of Succession Duty — Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 10 [*Revised Ed. Statutes, vol. xi. p.* 597]—*Customs and Inland Revenue Act* 1881 (44 *Vict. c.* 12), *ss.* 27, 41.

A. died intestate and without having been married. He was entitled to an interest in reversion expectant on his father's death, in a settled fund. The father, to whom letters of administration of *A.*'s estate were granted, paid 3 per cent. administration duty under sect. 27 of the *Customs and Inland Revenue Act*, 1881, upon the estimated value of *A.*'s estate, including the above reversionary interest:—

Held, that the father was exempted by sect. 41 of the same Act from paying duty at £1 per cent. in respect of *A.*'s succession to his father, under sect. 10 of the *Succession Duty Act*, 1853.

PETITION.

By a marriage settlement dated the 10th of March, 1855, sums, the present value of which was about £20,000, were settled, after the life estates of the wife and husband, and subject to a power of joint appointment by them, which power was never exercised, on all and every the children and child of the marriage, who should attain twenty-one or marry.

The wife died on the 21st of October, 1876, leaving issue of the marriage, one child only, a son, who attained twenty-one on the 23rd of June, 1880, and died on the 6th of November, 1881, intestate, and without having ever been married.

Letters of administration to the son's estate were on the 13th of March, 1882, granted to the Petitioner, the father, and duty was then paid, at the rate of £3 per cent. on the son's estate, including a sum of £14,000 odd, which was the estimated value at the son's death of the reversionary interest of the son expectant on his father's decease. The duty was paid under the provisions, and according to the scale, of sect. 27 of the *Customs and Inland Revenue Act*, 1881.

The Petitioner, being now entitled absolutely to the whole fund comprised in the settlement, called upon the trustees to convey to him; and the trustees having, before doing so, inquired whether the Crown had any further claim on the estate, were

V.-C. B. 1883 *In re* HAYGARTH'S TRUSTS.

informed that the Crown claimed succession duty at £1 per cent. on the whole of the fund in settlement in respect of the prospective succession of the son or his estate to the father, and claimed to have it paid without waiting for the father's death, because the father was now claiming the whole fund.

The trustees thereupon transferred part of the fund into Court to meet this claim, and the Petitioner now prayed that the residue of this fund might be transferred to him after sale of such part as might be necessary for the payment of costs, and if the Court should so determine, of the succession duty.

Marten, Q.C., and *Morshead*, for the Petitioner:—

The Petitioner having paid administration duty in conformity with the Act of 1881 is expressly relieved by sect. 41 of the Act from paying succession duty (1). No doubt there was a succession in this case to the father from the son; but it is only one property, and that is the whole question. Duty cannot be payable twice over in respect of the same property.

Pownall, for the Trustees.

V. Hawkins, for the Crown:—

Upon the execution in 1855 of the settlement, there attached to the property, on the devolution to any children or child, on the death of the survivor of husband and wife, a liability to succession duty at £1 per cent. on the whole sum in settlement. This £1 per cent. is what the Crown now claims. Strictly it is not payable till the death of the father, but if the father comes, as he does now, claiming to have the fund transferred to him, the sum

(1) Sect. 41 of the *Customs and Inland Revenue Act*, 1881, is as follows:—

"In respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this Act, the duty at the rate of one pound per centum imposed by the Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four, shall not be payable;

"And in respect of any succession to property according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this Act, the duty at the rate of one pound per centum imposed by the *Succession Duty Act*, 1853, shall not be payable."

payable to the Crown should be impounded and paid now: *Bailey* v. *Tindall* (1).

It has been insisted that administration duty has been paid under the intestacy. But this is a claim under the settlement, which is paramount to the interest under the intestacy. The claimant under the intestacy is entitled to no more than the residue after the succession duty has been paid. What has happened here is, that the Petitioner has paid administration duty, not upon £20,000, but upon a sum of between £14,000 and £15,000, and then contends that one payment satisfies the other. The reduced amount of £14,000 odd can only have been duly arrived at by deducting this very succession duty which is now claimed.

The 41st section of the statute is intended to apply only when the succession duty on the one hand, and the legacy, probate, or administration duty on the other, are payable under the same will or under the intestacy of the same person. Here the succession duty arises upon the prospective death of the father, the administration duty on the death of the son. Succession duty is payable on the whole amount of the succession; probate or administration duty is payable only on the residue after debts, funeral, and testamentary expenses have been paid.

Sect. 41 provides for two things; the first clause has reference to leaseholds, upon which succession duty, not legacy duty, is now payable; the second has reference to cases where probate or legacy duty has already been paid under the same will. It only means to remit duty which would be otherwise payable under the same will or the same intestacy.

BACON, V.C.:—

The only question before me is as to the construction of the *Customs and Inland Revenue Act*, 1881. The question is one purely to be determined by the statute. I have paid great attention to the argument of Mr. *Vaughan Hawkins*, still I come back to this, that I must deal with the subject under the statute. The general scope of all the statutes relative to this subject is this: the State says that before you are entitled to receive any property by

(1) 18 Jur. 668.

V.-C. B. 1883 *In re* HAYGARTH'S TRUSTS.

succession or by legacy or otherwise, when your title has arisen, the State will take from you a certain percentage, and you shall only receive that which you are apparently entitled to after the deduction of that percentage, which belongs to the State. The *Succession Duty Act* of 1853 provides that there shall be a duty of one per cent. payable under the present circumstances. The Act of 1881 having in contemplation the Act of 1853, and providing for the case of probate and legacy duty, says that whenever you have exhibited your inventory, supported it by your affidavit, and the Legacy Office is satisfied, and when you have paid the duty of 3 per cent., you shall be exempt from paying that duty which the Act of 1853 requires you to pay. That is most eminently reasonable and most fair and just, because these interests in succession are of such an infinite variety and form, that the persons in whom they are vested, being exposed to all the accidents of life and death, and so on, may find it necessary, or their creditors may find it necessary, that their reversionary interest, or their succession interest shall be made available for present purposes. Well, death is one of those events. A man who is entitled under a settlement to the settlement fund, is *primâ facie* chargeable with the 1 per cent. duty, and no more. If it is necessary for his creditors, legatees, or anybody else who is interested in his property, to realize his property, and part of his property consists of his reversionary interest, that is subject, *primâ facie*, to a duty of 1 per cent. But if the provisions of the Act of 1881 are complied with, and an inventory supported by an affidavit is exhibited, and the whole of the property, including this succession, is placed before the Legacy Duty Office, then, upon payment of 3 per cent., in the very terms of the statute, the payment of the 1 per cent. succession duty is abolished. It is no longer operative. The words are open to no kind of doubt. [His Lordship read the 41st section, and continued:—] Unless I am authorized to repeal that statute, I say that, in very plain terms in this case, the succession duty which would have been payable under the settlement is by this Act of Parliament released, and the personal representative who has paid the 3 per cent. is no longer liable to pay the 1 per cent. There will be a declaration that no further duty is payable in respect of the trust fund, subject to the

V.-C. B. 1883 *In re* HAYGARTH'S TRUSTS.

trusts of the indenture of settlement or in respect of the estate of the intestate.

The costs of the Petitioner and trustees may be paid out of the fund in Court, and the balance must be transferred to the Petitioner.

Solicitors: *Tylee, Wickham, Moberly, & Tylee; G. T. Woodrooffe; Solicitor to Inland Revenue.*

J. B. D.

V.-C. B. 1883 *Feb.* 14, 15.

GENERAL CREDIT AND DISCOUNT COMPANY *v.* GLEGG.

[1881 G. 1977.]

Mortgagor and Mortgagee—Advance to be repaid by Instalments—Stipulation for Payment of "Commission" on Instalments not duly repaid—Sale—Foreclosure—One Time for Redemption.

A mortgagee agreed to advance to a mortgagor a sum to be repaid at specified dates by instalments, with interest at £6 per cent. per annum, and if the bank rate should exceed £4 per cent. additional interest equal to the excess. If default was made in payment of any instalment at due date there was also to be paid a "commission" of £1 per cent. for every month or part of a month from the due date to the date of payment of such instalment:—

Held, that this "commission" was not in the nature of a penalty, and that the mortgagee was entitled to charge for it in taking the account.

Foreclosure ordered with one term of redemption for all the puisne mortgagees, as in *Bartlett* v. *Rees* (1).

On a security upon railway shares with power of sale, under which the shares were transferred to the lenders:—

Held, that the lender was entitled to foreclosure, and that *Carter* v. *Wake* (2) did not apply.

BY articles of agreement made the 29th day of September, 1874, between the Plaintiffs, the *General Credit and Discount Company, Limited*, of the one part, and *Edwin Clark* and *William Henry Punchard*, carrying on business as "*Edwin Clark, Punchard, & Co.*," contractors, on the other part, after reciting that by an indenture made on the 19th of January, 1874, between the *Buenos Ayres* and *Campana Railway Company, Limited*, of the

(1) Law Rep. 12 Eq. 395. (2) 4 Ch. D. 605.

V.-C. B. 1883 GENERAL CREDIT AND DISCOUNT COMPANY v. GLEGG.

one part, and the contractors of the other part, the contractors covenanted with the company to construct for them a line of railway therein described and certain stations and works, upon the terms therein expressed, and that the contractors had applied to the company to lend them £400,000, it was mutually covenanted and agreed that the company would advance to the contractors £400,000 by the following instalments, namely, £100,000 on the 29th of September, 1874, £50,000 on the 15th of October, 1874, and £50,000 on the 15th of each succeeding month until the whole sum of £400,000 should have been advanced. The contractors agreed to repay each instalment at the expiration of six months from the date of the advance. They also agreed to pay to the company a commission at the rate of £3 per cent. upon the whole of the £400,000 at the time when the £100,000 should be advanced; and the company were to be at liberty to retain the same out of the first instalment. The contractors further agreed to pay to the company interest at the rate of £6 per cent. per annum upon each instalment during such time as the bank rate should not exceed £4 per cent., and if the bank rate should rise above £4 per cent. then additional interest above £6 equal to the excess of the bank rate above £4 per cent.; the £6 per cent. interest on each instalment to be retained by the company out of such instalment, and the additional interest, if any, on each instalment to be paid to the company when such instalment should become repayable. If any instalment were not repaid by the contractors when due, the same was to bear interest at the rate of £6 per cent. per annum, and additional interest as before provided, until the instalment should be repaid, "and also a commission of £1 per cent. for every month or part of a month that may elapse between the due date and the date of the payment of such instalment, upon the whole amount of such instalment." By way of collateral security the contractors agreed to deposit with the company debenture stock of the *Buenos Ayres* and *Campana Railway Company*, some fully paid-up shares of the *Rio Tinto Railway Company*, and other like securities, and it was provided that if the contractors should make default in repayment of any instalment, interest, additional interest, or commission, the company were to be entitled to sell the

securities so deposited as aforesaid, and apply the proceeds in satisfaction.

The shares and stock were accordingly transferred into the names of trustees for the company, and the certificates were held by the company.

Under this and subsequent agreements, under which further shares and stock were transferred to trustees for the company, large advances were made by the company, until in the early part of 1879 the contractors became bankrupt, and the first Defendant *James Glegg* was appointed their trustee in bankruptcy.

The statement of claim in the action was delivered on the 15th of December, 1881, claiming that if necessary the priorities of four sets of Defendants (subsequent incumbrancers to the Plaintiffs), other than the first Defendant, might be duly determined, and that an account might be taken of what was due to the Plaintiffs for principal, interest, additional interest, "commission," and costs, and for repayment; or in default for foreclosure or sale.

Amongst the questions raised at the trial of the action was, whether the Plaintiffs were entitled, on the account being taken of what was due to them, to charge for the so-called "commission" of £1 per cent. per month stipulated for in the deed of the 29th of September, 1874.

Hemming, Q.C., and *F. C. Norton*, for the Plaintiffs:—

We ask a foreclosure order with one term of redemption for all the puisne mortgagees, the nature of the property, which can only be advantageously sold by judiciously finding the market, and the circumstances being such as to render delay exceedingly injurious. This was done in *Bartlett* v. *Rees* (1), following *Edwards* v. *Martin* (2).

[*Horton Smith*, Q.C. (*amicus curiæ*), mentioned *Beevor* v. *Luck* (3), where Vice-Chancellor *Wood* had declined to follow *Edwards* v. *Martin*.]

Grosvenor Woods, for the Defendant *Glegg*.

(1) Law Rep. 12 Eq. 395. (2) 7 W. R. 30.
(3) Law Rep. 4 Eq. 537.

V.-C. B.
1883
GENERAL CREDIT AND DISCOUNT COMPANY v. GLEGG.

Millar, Q.C., and *Charles B. McLaren*, for the second incumbrancers:—

In a case decided in Chancery in 1693, it was held that where interest had been reserved at £5 per cent., but if not duly paid, then to answer interest at £6 per cent., the mortgagor was decreed to pay but £5 per cent., the reservation of £6 per cent. being only *nomine pœnæ*: *Lady Holles* v. *Wyse* (1). To the same effect is *Strode* v. *Parker* (2); and see further *Nicholls* v. *Maynard* (3); *Thompson* v. *Hudson* (4); *Wallis* v. *Smith* (5).

If this so-called "commission" had been reserved as interest, clearly the Plaintiffs could not have claimed it in account against the mortgagor.

Stirling, for third incumbrancers, cited *Herbert* v. *Salisbury and Yeovil Railway Company* (6).

Hemming, in reply:—

We do not dispute the rule that a retrospective increase of interest in case of default is a penalty, but this case does not fall within it. The increase here is not retrospective, as the additional percentage runs only *de mense in mensem* from the date of default, and it has long been settled that the rule invoked against us has no application to such a case: *Burton* v. *Slattery* (7); *Herbert* v. *Salisbury and Yeovil Railway Company*.

BACON, V.C.:—

It has been said in the course of the argument that this is the first time this point has been presented in its present shape; and I certainly do not recollect its having been raised before.

But in essence and in substance this is not a contract for paying additional interest—it is a contract to protect the lenders against a state of things which might possibly arise—namely, that it might suit the convenience of the contractor, upon coming into possession of money on surveyor's certificates at the end of every

(1) 2 Vern. 289.
(2) Ibid. 316.
(3) 3 Atk. 519.
(4) Law Rep. 4 H. L. 1.
(5) 21 Ch. D. 243.
(6) Law Rep. 2 Eq. 221.
(7) 5 Bro. P. C. 233.

month or some other interval, instead of paying the money to the Plaintiffs to lend it at interest, which at *Buenos Ayres* may be 20 or 25 per cent., for aught I know. I do not say such a state of things ever existed, but it might arise, and I mention it only for the purpose of illustrating what was the true nature of the contract between the parties.

In my opinion the contract to pay commission is a thing wholly separate from the contract to pay interest. The payment is called by a separate name. Whether it be an accurate name or not, it is the name which the parties have adopted for themselves. The agreement is, that if the borrower does not pay the interest punctually, he will pay £1 per cent. upon what he ought to have paid until he does pay. The case does not come within the principles of the cases in *Vernon*, nor within that of *Wallis* v. *Smith* (1). It is a distinct, separate, substantive contract to pay something in case the borrower makes default. That is not an agreement in the nature of a penalty.

In my opinion this so-called "commission" is just as valid a portion of the sum due as is the interest reserved by the contract. There will be the ordinary mortgagee account, and in taking that account there must be no direction and no intimation to the Chief Clerk that he is to treat the commission as an illegal charge.

Millar:—Then there comes the question as to the sale.

The provisions of the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 25, will be present to the mind of the Court, and in *Carter* v. *Wake* (2) the Master of the Rolls pointed out that the pledgee of personal chattels has not the same right of foreclosure as a mortgagee by deposit of title-deeds.

In a case of *Woolley* v. *Colman* (3), before Mr. Justice *Fry*, his Lordship, at the instance of third and fourth mortgagees, made a decree for sale, and gave the conduct of the sale to the applicants, on the ground that they had a direct interest in realising the most that could be got out of the property.

If the Court will not make an order for sale at once, liberty to apply should at least be left open.

(1) 21 Ch. D. 243. (2) 4 Ch. D. 605.
(3) 21 Ch. D. 169.

V.-C. B. 1883 GENERAL CREDIT AND DISCOUNT COMPANY v. GLEGG.

If foreclosure is ordered it should be in the common form giving successive times for redemption.

Hemming, contrà:—

Carter v. *Wake* (1) applies to the case of a mere pledgee, but has no application where, as here, the legal interest is vested in the mortgagee. Our securities were actually transferred to us and placed on the register of the respective companies, as our certificates shew. In such cases there is a right to foreclosure.

As to the power given by the *Conveyancing Act*, 1881, to substitute sale for foreclosure, liberty to apply is unnecessary, as the parties are entitled, without it, to apply for a sale at any stage until foreclosure absolute.

After some discussion, a decree was taken in the form claimed for foreclosure, one period of six months being fixed for all the mortgagee Defendants to redeem or be foreclosed without prejudice to their rights *inter se*.

Solicitors: *Norton, Rose, Norton, & Brewer*; *Snell, Son, & Greenip*; *Trinders & Romer*; *G. M. Clements*.

(1) 4 Ch. D. 605.

J. B. D.

WHITE *v.* WHITE.

FRY, J.
1882
Dec. 15.

[1877 W. 72.]

Power—Appointment—Election.

A testator, having power under a settlement to appoint the settled hereditaments to children of his first marriage only, appointed the settled hereditaments (describing them as his own property) in favour of a son of the first marriage subject to a charge in favour of his other children, including the children of his second marriage, and he devised property of his own to the same son subject to the same charges in favour of his other children "so as to equalize the shares of all his children in all his property":—

Held, that a case of election arose in favour of the children of the second marriage.

Woolridge v. *Woolridge* (1) distinguished.

JOHN R. WHITE, of *Bruton, Somerset*, was twice married, and by his first wife, *Clary White*, he had seven children, one son and six daughters, and by his second wife, *Ann White*, he had two children, one son and one daughter.

On his first marriage a settlement was made, dated the 8th of September, 1845, whereby he settled his reversionary interest in part of an estate called the *Coombe Hill* estate for the benefit of himself and *Clary White* for their lives, and subject thereto upon trust for the children and issue of himself and the said *Clary White* in such manner as (in the events which happened) he the said *John R. White* should appoint, with a gift, in default of appointment, to the children of the marriage.

Clary White died and *J. R. White* married again in 1869, but no settlement was made on the second marriage.

Previously to the date of his will the said *John R. White* had issue by his second marriage and acquired other shares in the *Coombe Hill* estate, and by his will, dated the 11th of November, 1872, after referring to the settlement of 1845, he continued, "In execution of the power of appointment given by the settlement, I appoint my shares in the *Coombe Hill* estate comprised in the

(1) Joh. 63.

FRY, J.
1882
WHITE
v.
WHITE.

said settlement unto my eldest son *Walter*, his heirs and assigns, but subject to the charges in favour of his brother and sisters in this my will hereinafter mentioned, and in every other respect I confirm my said settlement. I devise my remaining shares in the said *Coombe Hill* estate and the close adjoining which I have purchased unto my eldest son, his heirs and assigns, but subject to such charges in favour of his brother and sisters as shall equalize the shares of all my children in all my said property."

He then gave certain bank shares to his said eldest son, to be accounted for as part of his share, and "to be charged with such a sum as should equalize the shares of all his, the testator's, children in all his property."

The testator then directed that his sister *Julia* should be permitted to reside on a part of the *Coombe Hill* estate, which was included in the settlement, for her life at a specified rent.

He devised the residue of his real and personal estate to trustees for sale, and directed them to pay his widow an annuity, and to pay the remainder of the income to his children, and on his wife's death to pay the capital to his children then living.

This was an action for the administration of the estate of *John Richard White*.

In addition to the settled property sufficient was given by the will for the benefit of the elder son to enable the trustees by apportionment to equalize the shares of all the children.

The children of the second marriage and the testator's sister *Julia* not being objects of the power, the question arose whether they were entitled to enforce the dispositions of the settled property which were in excess of the power so as to raise a case of election in their favour, if the children of the first marriage declined to give effect to those dispositions.

Cookson, Q.C., and *B. B. Rogers*, for the Plaintiffs, two infant children of the first marriage:—

The testator has attempted to modify the appointment of the settled property in a way which the law will not allow, and the charges he has attempted to impose must be disregarded, and there is no case of election in favour of the children of the second

marriage: *Carver* v. *Bowles* (1); *Woolridge* v. *Woolridge* (2); *Wollaston* v. *King* (3); *Churchill* v. *Churchill* (4).

Everitt, Q.C., and *Rawlins*, for *Walter*, the elder son:—

The settled property is validly appointed to the children of the first marriage, and the superadded charges and directions are void and no case of election is raised: *Churchill* v. *Churchill*.

Cozens-Hardy, Q.C., and *Dyne*, for the children of the second marriage:—

A case of election arises; the testator treated the settled and unsettled property as alike subject to his will.

This is not an absolute appointment with a subsequent void direction to settle. There is a direct appointment to strangers to the power: *Whistler* v. *Webster* (5).

In the cases cited for the Plaintiffs the direction superadded to the appointment was not a direct independent gift but a qualification in favour of the family of the appointee, and this was held to be not a direct gift but a void qualification of the appointment.

FRY, J., stated the two marriages of the testator and the settlement, and said:—

At the time of his will the testator *John R. White* had issue of his second marriage, who were of course not objects of the power contained in the marriage settlement. By his will the testator recited the settlement of 1845 made on his marriage with his first wife *Clary* as a settlement "whereby I conveyed to trustees therein named my reversionary interest after the decease of my mother to certain shares in an estate called *Coombe Hill*."

Now I pause here to observe that he describes this interest in the property which he had conveyed to his trustees as if it were still his own, and he calls it "my reversionary interest." That may be explained, it is said, by saying it was his reversionary

(1) 2 Russ. & My. 304.
(2) Joh. 63.
(3) Law Rep. 8 Eq. 165.
(4) Ibid. 5 Eq. 44.
(5) 2 Ves. 367.

FRY, J.
1882
WHITE
v.
WHITE.

interest at the date of the settlement, but I think the subsequent language shews he thought it was part of his property.

Then he recites the death of his mother and his wife, and he says, "Now I do hereby by virtue and in execution of the power of appointment given to me by the settlement appoint my shares in the *Coombe Hill* estate unto my eldest son *Walter*, his heirs and assigns, but subject to the charges in favour of his brother and sisters in this my will hereinafter mentioned, and in every other respect I confirm my said settlement." There, again, I stop to make this observation, that what he appoints he describes as "my said shares" as if they were still part of his property.

Then he proceeds to devise the other shares which he had acquired in the *Coombe Hill* property and the adjoining closes, which were in no way subject to the settlement of 1845 to his said son *Walter* "subject to such charges in favour of his brother and sisters as shall equalize the shares of all my children in all my said property."

Now it appears to me plain that the charges referred to in the first clause, namely, the charges on the settled shares in the *Coombe Hill* property are the same charges as those which are imposed on the other shares in the *Coombe Hill* property, and on the entirety of the adjoining closes. There is only one set of charges.

[His Lordship read the further clauses in the will relating to the gift of the bank shares, and the direction that the testator's sister should reside on part of the settled *Coombe Hill* estate, and continued as follows:—]

Now the first question arises in this way. The two first clauses in the will have made the settled property and the unsettled property subject to the same charges in favour of persons who are not objects of the power of appointment. Does that create a case of election in favour of those persons, namely, the children of the second family, who were clearly entitled under the terms of his disposition to charges upon both the settled and the unsettled property, or does it create no case of election at all? It is plain that they are objects of the charges on the settled property, and it is plain that the persons who take that settled

property in default of the exercise of the power, are themselves objects of benefits conferred by gifts of the unsettled property. *Primâ facie* therefore you have a case in which the persons who take the settled property take also under the will benefits out of the unsettled property, and if they take the settled property in a manner which defeats the intention of the testator, that would appear to give rise to a case for compensation to the persons who are so disappointed.

That this is the general rule as regards appointments can hardly be doubted. It has been stated by Sir *W. M. James*, when Vice-Chancellor, in *Wollaston* v. *King* (1) in these terms, adopting the words of the judgment in *Whistler* v. *Webster* (2) that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it, whereby any disposition is made shewing an intention that such a thing should take place.

But there is a class of cases which at first sight appear to be in conflict with the generality of that rule. That class of authorities consists of *Carver* v. *Bowles* (3), *Woolridge* v. *Woolridge* (4), and other cases of the same description, including the case of *Wollaston* v. *King*, which I have just mentioned. In those cases the testator had exceeded the power vested in him by directing that certain property which he had in the first place appointed absolutely to an object of the power, should be held upon trusts or subject to conditions in favour of persons who were not objects of the power, but who would probably be objects of any settlement or provision which might be made by the appointee. The question, therefore, arose whether those gifts to the persons not objects of the power were void, or whether the absolute appointment must be held good and the modifications be rejected, and the conclusion which the Court arrived at was, that as there was an absolute gift to the object of the power, that must prevail, and the modifications which were not valid in law must be rejected; and the moment the Court arrived at that conclusion it was apparent that no case of election arose; because the object of the power is the only person who takes; and there is no conflict between him and

(1) Law Rep. 8 Eq. 165, 174.
(2) 2 Ves. 367.
(3) 2 Russ. & My. 304.
(4) Joh. 63.

FRY, J.
1882
WHITE
v.
WHITE.

a person who is not an object of it. Therefore in those cases the whole question as to election fell to the ground.

The question I have to determine, therefore, is this: Can the gift to *Walter* stand, and the condition that it shall be subject to a charge be rejected so far as it is in excess of the power, or can the appointment to *Walter* take effect only so far as the testator intended him to take it? It appears to me that the question may be really stated in another way. Is the condition or charge in the present case such a disposition of the gift to *Walter* as according to the ordinary course of family arrangements in this country he would be likely to make? I think it is not. It differs entirely from an appointment to a person, subject to a declaration of trust for the benefit of the issue or husband or family of that person. It is an attempt by the testator to impose on the appointed property an obligation to produce an equality between the objects of the power and the other members of his family. I think, therefore, the present case is not within the principles of *Carver* v. *Bowles* (1), and the cases I have referred to.

That being so, I hold that a case of election has arisen between the persons who claim in default of the exercise of the power, and those who claim under the gift in the will.

His Lordship then gave judgment on certain other points arising under the will.

Solicitors: *Bolton, Robbins, & Busk.*

(1) 2 Russ. & My. 304.

C. W. C.

HUGHES-HALLETT *v.* INDIAN MAMMOTH GOLD MINES COMPANY.

FRY, J.
1882
Nov. 29;
Dec. 13, 18, 19.

[1881 H. 1618.]

Trustee and Cestui que Trust—Indemnity against Future Liability—Quia Timet Action—Shares in Company in Liquidation.

A trustee held shares in a company on trust for an adult *cestui que trust*. He had applied for them at the request of the *cestui que trust*, who paid the money due to the company on the application and allotment. The trustee executed a transfer of the shares to the *cestui que trust*, and the latter sent it to the company for registration, but the directors refused to register it, and when an order was made to wind up the company the name of the trustee remained on the company's register as the holder of the shares. No further call had been made on them. The trustee brought an action against the *cestui que trust*, claiming an indemnity against liability on the shares. There was no evidence to shew whether calls were likely to be made in the winding-up:—

Held, that the action was a mere *quia timet* one, and that it was premature and could not be maintained.

Lord Ranelagh v. *Hayes* (1) not followed.

THIS action was brought to rescind a contract by the Plaintiff to take shares in the *Indian Mammoth Gold Mines Company*, and to obtain from the other Defendants an indemnity against liability on the shares.

The company was formed by registration under the *Companies Acts*, 1862 and 1867, on the 13th of August, 1880, for the purpose of working some gold mines in *India*. The liability of the shareholders was limited, the nominal amount of each share being £1. On the 14th of August, 1880, a prospectus of the company was issued by the directors. For the purposes of the present report it is unnecessary to refer to the statements contained in the prospectus. Shortly after it had been issued it was seen by the Plaintiff. One *E. M. Cookesley* had an interest in the mine, which the company had agreed to purchase, and at his request the Plaintiff applied for and obtained an allotment of 4000 shares in the company, and paid 2*s.* 6*d.* per share on application, and a further sum of 2*s.* 6*d.* per share on allotment, making £1000 altogether.

(1) 1 Vern. 189.

FRY, J.
1882
HUGHES-HALLETT v. INDIAN MAMMOTH GOLD MINES COMPANY.

The Plaintiff was to hold the shares as a trustee for *Cookesley*, and *Cookesley* furnished him with the £1000 which he paid for the shares.

The allotment to the Plaintiff was made, so far as appeared, by the secretary of the company without any authority from the directors. When *Cookesley* asked the Plaintiff to apply for the shares he said that he would get the Plaintiff to execute a transfer of the shares to him (*Cookesley*), and that he (*Cookesley*) would send it in to the company for registration within a fortnight or three weeks. The Plaintiff executed a transfer accordingly, and *Cookesley* afterwards sent it to the company for registration, but the directors, under a power contained in the articles of association, refused to register it, and consequently the Plaintiff's name remained on the company's register as the holder of the shares.

The Plaintiff, on the 13th of April, 1881, issued the writ in this action against the company, the directors, and *Cookesley*. He alleged by his statement of claim that he applied for the shares on the faith of the prospectus, from which he believed that the property of the company was valuable, and that he was incurring no risk in making the application; and he alleged that the prospectus contained material misrepresentations and omitted to disclose material facts. The Plaintiff claimed to have the allotment of shares to him cancelled, the contract to take the shares rescinded, and the register of the company rectified accordingly. He also claimed an indemnity by the directors and by *Cookesley* from any liability in respect of the shares.

By their statements of defence the directors denied that the Plaintiff applied for shares on the faith of the prospectus, and alleged that he did so in pursuance of an agreement between himself and *Cookesley*. They also denied that the prospectus contained any misrepresentations or omitted to disclose any material facts.

Cookesley, by his statement of defence, did not deny that the Plaintiff applied for the shares at his request.

On the 29th of June, 1881, an order was made to wind up the company. The Plaintiff afterwards applied to Mr. Justice *Chitty*, to whose Court the winding-up was attached, for leave to continue the proceedings in the action against the company, but this

application was refused. Consequently the action proceeded only against the directors and *Cookesley*.

Cookesley did not appear at the trial.

For the purposes of this report it is unnecessary to refer to the evidence as to the alleged misrepresentations in the prospectus.

When the action came on for trial 15*s.* per share remained uncalled, and there was no evidence to shew whether any further call was likely to be made in the winding-up.

W. W. Karslake, Q.C., and *R. C. Dobbs*, for the Plaintiff:—

The Plaintiff is entitled as against *Cookesley* to an indemnity against all future liability on the shares. As against him the case is really undefended. We ask for a judgment in the form given in *Seton* on Decrees (1).

[FRY, J.:—As against *Cookesley* it is a mere *quia timet* action. Can you maintain an action to enforce an indemnity against a liability which may never exist? *Lord Ranelaugh* v. *Hayes* (2) is, so far as I know, the only case in your favour, but it has been disapproved (3).]

If the Plaintiff had not come to the Court now he would have been told he was too late. A trustee ought not to be left for a moment under liability for a *cestui que trust* who is *sui juris*. The mere fact that the Plaintiff is on the list of contributories of a company which has been ordered to be wound up is sufficient to entitle him to the indemnity: *Evans* v. *Wood* (4).

[FRY, J., referred to *Antrobus* v. *Davidson* (5).]

That was a case of principal and surety; the right of a trustee is higher. In *Wooldridge* v. *Norris* (6) it was held that a surety who had not actually paid anything was entitled to an indemnity from the estate of his principal.

[FRY, J.:—That case depended on the construction of the bond; the contingency provided against had actually arisen.]

In the present case a legal liability has accrued. In *Phené* v.

(1) 4th Ed. vol. ii. p. 1378.
(2) 1 Vern. 189.
(3) *Vide Lloyd* v. *Dimmack*, 7 Ch. D. 398.
(4) Law Rep. 5 Eq. 9.
(5) 3 Mer. 569.
(6) Law Rep. 6 Eq. 410.

FRY, J.
1882
HUGHES-HALLETT v. INDIAN MAMMOTH GOLD MINES COMPANY.

Gillan (1) Vice-Chancellor *Wigram* said: "It was contended on behalf of the Defendant that in the case of a trustee and *cestui que trust*, the trustee cannot proceed in this Court until he has been actually damaged, although, if he had paid anything, he might have come to be indemnified. I do not accede to that proposition. If it was a subsisting liability the trustee is not bound to be out of funds for a moment." The Plaintiff is entitled to specific performance of the Defendant's contract to register the transfer of the shares.

[The argument on the question as to the prospectus does not call for a report.]

Cozens-Hardy, Q.C., and *A. R. Kirby*, for the directors, were not heard.

FRY, J. (after stating the facts), continued:—

The Plaintiff's case against *Cookesley* is this, that he is liable to indemnify him in respect of the 15*s.* still payable on the shares, and upon the evidence before me I am certainly of opinion that the Plaintiff is entitled to an indemnity from *Cookesley* in respect of that 15*s.* But then arises this fact for consideration, namely, that no part of the 15*s.* has been called for, and for anything that appears in evidence before me, no part ever will be called for. Whether it will in fact of course I cannot tell. It appears to me, therefore, that this is the simple case of a person who has taken property in his own name on behalf of another, and who is entitled to an indemnity from that other person against liability in respect of that property, suing for an indemnity before the contingency which creates the damage has arisen. It is, in my judgment, a mere action *quia timet*, and it is a very important inquiry whether such an action can be maintained. If it can, it is obvious that every person who has undertaken a position of responsibility for another which entitles him to an indemnity may sue before the right to indemnity accrues—before the damage has accrued which gives rise to the right to indemnity. It appears to me that there is no authority for such an action. The case of *Lord Ranelaugh* v. *Hayes* (2) is, so far as I am aware, the only authority which

(1) 5 Hare, 1, 12. (2) 1 Vern. 189.

countenances such a view, and, as I observed on a previous occasion, that case has never, so far as I am aware, been followed. I can see, therefore, no authority binding me to pronounce such a judgment, and I must decline so to enlarge the jurisdiction of the Court. It appears to me that it would lead to most injurious consequences if I were to allow a person in the position of the Plaintiff to seek for an indemnity before he is injured. There have been, undoubtedly, cases in which, where a contract for indemnity existed, and a right to sue upon that contract had arisen, the Court has declared the right to indemnity generally, and has put matters in such a train that, when the subsequent right to indemnity should arise, the indemnity might be worked out. Some forms of judgments in that class of cases are to be found in the last edition of *Seton* on Decrees, and they shew that where a person has taken shares for another, and a call has been made which has not been met by the person liable to pay it, the trustee who is entitled to an indemnity may obtain a declaration of his title generally, and may possibly obtain liberty to apply from time to time to work it out.

It has been contended that the Plaintiff is entitled to some better contract of indemnity than that which has been entered into by *Cookesley*, but, in my judgment, that is not the law of the Court. If the Plaintiff was minded to accept the personal contract of *Cookesley* for indemnity, he must be content with that, and I cannot possibly give him any better indemnity. If authority were necessary for that proposition it appears to me that it is supplied by the case of *Brough* v. *Oddy* (1).

Then it is said that this is not a mere action *quia timet*, because there has been a breach of *Cookesley's* contract to obtain a transfer of the shares. It appears to me that the real contract between the Plaintiff and *Cookesley* was only that *Cookesley* should send in the transfer for registration, and that contract he has performed. But, even if the contract were to obtain the registration of the transfer, that is not a contract which this Court would specifically perform, because it is admitted that the reason why the transfer has not been registered is the refusal of the directors to register it, a refusal with which I have no power of dealing in an action

(1) 1 Russ. & My. 55.

FRY, J.
1882
HUGHES-HALLETT v. INDIAN MAMMOTH GOLD MINES COMPANY.

between the Plaintiff and *Cookesley*. It appears to me, therefore, that, so far as this is an action against *Cookesley* for specific performance, it is misconceived, because there is the right in a third person to prevent the specific performance. So far as it is an action for indemnity it is also misconceived, because no liability has yet arisen which can give rise to an action. I am therefore, though somewhat unwillingly, compelled to refuse the Plaintiff any relief as against *Cookesley*.

His Lordship then considered the case made by the Plaintiff against the Defendant directors, and held that that case also failed. And his Lordship dismissed the action with costs, except as against the company.

Solicitors for Plaintiff: *Matthews & Greetham.*
Solicitors for *Cookesley*: *Miller, Smith, & Bell.*
Solicitors for Directors: *Edward Smith & Co.; Heath, Parker, & Brett.*

W. L. C.

FRY, J.
1882
Dec. 19.

GREENE *v.* FOSTER.

[1881 G. 2775.]

Mortgage—Foreclosure—Delivery up of Deeds—Disclaimer—Costs.

When a judgment for foreclosure is given against a puisne mortgagee, the Plaintiff is not entitled to delivery up of deeds, of subsequent date to his own mortgage, dealing only with the title to the equity of redemption.

A defendant to a foreclosure action, who was originally properly made a party, is entitled to his costs incurred subsequently to his making a proper offer to disclaim.

After the commencement of a foreclosure action the solicitors of the Defendants (who were second mortgagees) wrote to the Plaintiff's solicitors, offering to consent to the dismissal of the action without costs, and to hand over a release at Plaintiff's expense. The Plaintiff brought the action to a trial, insisting that he was entitled to delivery up by the Defendants of some deeds which affected only the title to the equity of redemption:—

Held, that the letter contained a proper offer to disclaim; that the Defendants were entitled to their costs subsequent to its date; and that the Plaintiff was not entitled to the deeds which he claimed.

THIS was a foreclosure action.

The mortgage, which afterwards became vested in the Plaintiff,

was created by a deed dated the 1st of November, 1872, by which *John Warth*, the younger, granted certain property in the *Isle of Ely* to *Richard Daintree* and *W. C. J. Mellor* in fee, by way of mortgage. On the 2nd of December, 1875, *John Warth*, the younger, granted the property (subject to the mortgage) to *John Warth*, the elder, in fee. On the 7th of January, 1878, *John Warth*, the elder, deposited the deed of the 2nd of December, 1875, with the Defendants, together with a written memorandum signed by him acknowledging that the deed was deposited as a security for moneys advanced by the Defendants to him. On the 7th of January, 1880, *John Warth*, the elder, was adjudicated a bankrupt, and on the 20th of August, 1881, the trustees appointed in the bankruptcy executed a disclaimer of the bankrupt's estate and interest in the mortgaged property.

The writ in the present action was issued on the 8th of November, 1881. On the 2nd of February, 1882, the Defendants' solicitors wrote to the Plaintiff's solicitors as follows:—

"We have been considering with our clients as to this, and we are prepared to consent to the dismissal of the action without costs, and are prepared to hand over the release already settled between you and them on payment of the charges for the same."

At this time the Defendants had not appeared to the writ. The Plaintiff's solicitor insisted that the Defendants must hand over to the Plaintiff the deed of the 2nd of December, 1875, and the memorandum of deposit of the 7th of January, 1878. The Defendants would not consent to do this; and the action proceeded. The Defendants entered an appearance to the writ, and by their statement of defence, delivered on the 11th of May, 1882, they said, "The Defendants do not claim any interest in the mortgaged premises. After service of the writ upon them, the Defendants by their solicitors offered to execute and deliver to the Plaintiff at the Plaintiff's expense a deed evidencing their disclaimer, and a deed for that purpose was prepared on behalf of the Plaintiff, and approved on behalf of the Defendants, and has been executed by the Defendants and has been tendered to the Plaintiff, but the same has not been delivered to the Plaintiff in consequence of his declining to pay the costs." The Defendants then stated the

FRY, J.
1882
GREENE
v.
FOSTER.

effect of the letter of the 2nd of February, 1882, and added, "The Defendants now offer to consent to an immediate order dismissing this action against them without costs up to the 2nd of February, 1882, but with costs since that date."

By his reply the Plaintiff denied that he declined to pay the costs of the deed of disclaimer, and said that he required the Defendants to deliver to him therewith the deed of the 2nd of December, 1875, and the memorandum of deposit, but that the Defendants had refused and still refused to do so. In other respects the Plaintiff admitted the allegations contained in the statement of defence. And the Plaintiff offered to pay the costs of the deed of disclaimer, and submitted that the Defendants ought to be ordered to deliver to him the deed of the 2nd of December, 1875, and the memorandum of deposit, and that the Defendants were not entitled to any costs of the action.

The action now came on for trial.

Cookson, Q.C., and *E. J. Elgood*, for the Plaintiff:—

We are entitled to have the deeds which were deposited with the Defendants, as they disclaim all interest in the property. The Defendants took their mortgage with notice of ours: *Frazer* v. *Jones* (1); *Hunt* v. *Elmes* (2); *Heath* v. *Crealock* (3); *Coote* on Mortgage (4).

The Plaintiff is entitled to costs from the Defendants up to the trial. The letter of the 2nd of February, 1882, was not an adequate disclaimer; the Plaintiff is entitled to a disclaimer on the record: *Talbot* v. *Kemshead* (5); *Gowing* v. *Mowberry* (6); *Clarke* v. *Toleman* (7).

H. Fellows, for the Defendants:—

There is no authority for saying that the Defendants are bound to deliver up a deed of subsequent date to the Plaintiff's mortgage and solely relating to the equity of redemption. Such a deed might contain provisions giving the Defendants a personal remedy

(1) 5 Hare, 475.
(2) 2 D. F. & J. 578.
(3) Law Rep. 10 Ch. 22.
(4) 4th Ed. p. 1022.
(5) 4 K. & J. 93.
(6) 11 W. R. 851.
(7) 42 L. J. (Ch.) 23.

against the mortgagor, and it cannot affect the Plaintiff's title to the legal estate. It is not the practice in an ordinary foreclosure action to make an order for the delivery up of deeds dealing only with the equity of redemption. *Frazer* v. *Jones* (1) depended upon fraud, and it is no authority for the present case.

As to the costs, the rule is plain—that a Defendant who disclaims is not entitled to costs before his disclaimer, but he is entitled to the costs of evidencing his disclaimer: *Ford* v. *Earl of Chesterfield* (2); *Davis* v. *Whitmore* (3); *Furber* v. *Furber* (4); *Day* v. *Gudgen* (5); *Oliver* v. *Osborn*, before M.R. Aug. 1, 1867. The Defendants are entitled to the costs of the deed of disclaimer, and to the costs of the action since the date of their offer to be dismissed without costs.

Cookson, in reply:—

A disclaimer would be of no use unless the Plaintiff has the deeds which prove that the Defendants are mortgagees. It is necessary to my title that I should be able to shew that the foreclosure action was properly constituted. As to the costs, *Day* v. *Gudgen* is distinguishable, and the report of *Oliver* v. *Osborn* is very brief. The letter of the 2nd of February was not a proper disclaimer.

FRY, J.:—

It appears to me that the Defendants were properly made parties to the action in the first instance; but I think the letter of the 2nd of February, 1880, amounted to an unqualified offer to consent to be dismissed without costs. The general rule is that a defendant is entitled to his costs of a foreclosure action incurred after he has made a proper offer to disclaim, and to be dismissed without costs. I think that the letter of the 2nd of February contained a proper offer by the Defendants. They will therefore have no costs down to the 2nd of February, but they are entitled to their subsequent costs.

Then arises the question of substance, which it is admitted prevented the Plaintiff from accepting the disclaimer. The Plaintiff

(1) 5 Hare, 475.
(2) 16 Beav. 516.
(3) 28 Beav. 617.
(4) 30 Beav. 523.
(5) 2 Ch. D. 209.

FRY, J.
1882
GREENE
v.
FOSTER.

claims an order for the delivery up by the Defendants of all the deeds relating to the equity of redemption, and he says in effect that such an order ought to be made in every foreclosure action. There are, no doubt, arguments of convenience in favour of this claim. It may be very important to the Plaintiff in such an action to be able to shew that he has obtained the foreclosure judgment against the proper persons. On the other hand, the deeds may supply evidence of the debt due by the mortgagor to the second mortgagee, and may contain covenants by the mortgagor with him. There are arguments of convenience on both sides, but, in my view, there is an established practice on the point. No such form of judgment is to be found in *Seton* on Decrees, or in any other collection of precedents. I cannot recollect having ever seen such a judgment, nor can the Registrar. I have asked several of the learned counsel who are in Court whether they have ever seen such a judgment, and they tell me that they have not. I think, therefore, that the claim which is now made is at variance with the well-established practice of the Court. Of course what I am saying has no application to a case in which a deed affecting the title prior to the date of a plaintiff's mortgage has got into the possession of a defendant, and the plaintiff has a right to say that the absence of that deed would be a blot on his title. In such a case it may well be that the Court on giving a foreclosure judgment would order that deed to be delivered up by the defendant. All, however, that I decide is that, in a case in which a deed shews on its face that it deals only with the equity of redemption, the Plaintiff in a case like this is not entitled to have it delivered up. There will be the usual foreclosure judgment for an immediate foreclosure, and the Defendants will have their costs of the action, subsequent to the 2nd of February, 1882.

Solicitor for Plaintiff: *W. Elgood.*

Solicitors for Defendants: *Field, Roscoe & Co.*, agents for *Fosters & Lawrence, Cambridge.*

W. L. C.

JOY *v.* HADLEY.

FRY, J.

1883

Jan. 13.

[1882 J. 191.]

Order for Discovery or Inspection—Service—Attachment—Rules of Court, 1875, *Order* XXXI., *r.* 21.

In an action for the specific performance of an agreement by the Defendant to sell two leasehold houses to the Plaintiff, judgment for specific performance was given, and an order was afterwards made that the Defendant should, within four days after service of the order, produce to the Plaintiff "the abstract, and at the same time produce upon oath for inspection all deeds and writings in his possession or power" relating to the property:—

Held, that, under r. 21 of Order XXXI., service of this order on the Defendant's solicitors was sufficient service to found an application to attach the Defendant for disobedience of the order.

MOTION for leave to issue a writ of attachment.

The action was brought to enforce the specific performance of an agreement for the sale of two leasehold houses. On the 25th of July, 1882, upon a motion by the Plaintiff for judgment on the default of the Defendant in delivering a defence, the Court declared that the agreement between the Defendant and the Plaintiff ought to be specifically performed, and it was ordered that the Defendant should execute a proper assignment of the property to the Plaintiff, and deliver to the Plaintiff on oath, if required, all deeds and writings in the Defendant's possession or power relating to the property. On the 10th of November, 1882, on the application of the Plaintiff in Chambers, it was by consent ordered that the Defendant should, within four days after service of the order, produce to the Plaintiff at the office of the Defendant's solicitors, "the abstract, and at the same time produce upon oath for inspection all deeds and writings in his possession or power" relating to the property. This order was on the 13th of December, 1882, served on the Defendant's solicitors. The order was not obeyed, and on the 21st of December the Plaintiff served on the Defendant's solicitors a notice of motion, asking that he might be at liberty to issue a writ of attachment against the Defendant for his contempt in not within four days after service

FRY, J.
1883
JOY
v.
HADLEY.

of the order of the 10th of November, complying with its directions.

The Defendant did not appear.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the motion:—

The only question is whether rule 21 (1), of Order XXXI. applies so as to make the service of the order of the 10th of November on the Defendant's solicitors sufficient service to found the present application. We submit that the rule applies, and that the service is sufficient. The service of notice of the present motion on the Defendant's solicitors is sufficient: *Browning* v. *Sabin* (2).

FRY, J.:—

I think the order of the 10th of November is within the terms of rule 21, and that service of it on the Defendant's solicitors was sufficient. You may take leave to issue an attachment.

Solicitors: *Sidney St. J. Steadman & Co.*

(1) Rule 21, "Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may shew in answer to the application that he has had no notice or knowledge of the order."

(2) 5 Ch. D. 511.

W. L. C.

GUTHRIE *v.* WALROND.

[1873 G. 96.]

FRY, J.
1883
Jan. 11, 16.

Will—Debt—Locality—Domicil—Onerous Legacy—Right of Legatee to disclaim—Contingent Specific Legacy—Right to Income before happening of Contingency.

A testator resident in *England* at the time of his death bequeathed to his son "all his estate and effects in *Mauritius*." At the time of his death the purchase-money of real estate in *Mauritius* sold by him to persons residing in that island was due to him. He was not domiciled in *Mauritius*:—

Held, that this debt was included in the bequest of his property in *Mauritius*.

When by a will two distinct legacies are bequeathed to the same person, one of them being onerous and the other beneficial, *primâ facie* the legatee is entitled to disclaim the onerous legacy and to take the other.

If, however, onerous property and beneficial property are included in the same gift, *primâ facie* the legatee cannot disclaim the onerous and accept the beneficial; he must take the whole gift or none of it.

But this *primâ facie* rule may be rebutted if the will manifests a sufficient intention of the testator to the contrary.

Green v. *Britten* (1) followed.

The interim income subject to the interim burden of a contingent specific legacy until the happening of the contingency falls into the residue of the testator's estate, or goes to his next of kin, as the case may be.

SECOND FURTHER CONSIDERATION.

This suit was commenced in the Court of Chancery to carry into execution the trusts of the will of *J. A. Guthrie*, and to administer his personal estate. The testator by his will dated the 20th of April, 1872 (*inter alia*), gave the following legacy: "I give to my third son, *W. M. Guthrie*, all my estate and effects in the island of *Mauritius* absolutely if he shall attain the age of twenty-five years, or die under that age leaving male issue living at his death." And in case of his dying under that age without leaving such issue the testator gave the same estate and effects in a similar way to another son, *J. S. Guthrie*, with a similar gift over. The will contained a gift of all the residue of the testator's estate and effects to his executors on trust for all his children who being a son or sons should live to attain twenty-five, or should

(1) 42 L. J. (Ch.) 187.

FRY, J.
1883
GUTHRIE
v.
WALROND.

die under that age leaving issue living at his or their decease, or being a daughter or daughters should live to attain twenty-five years or marry under that age with the consent of the guardians, in equal shares. The testator died on the 17th of January, 1873. The son *W. M. Guthrie* was born on the 3rd of June, 1869.

The testator was resident in *England* at the time of his death, and it was admitted that his domicil at that time was not in the island of *Mauritius*.

The first question which now arose was whether the following debt was included in the bequest of "his estate and effects in the island of *Mauritius*."

The testator had sold certain real estate belonging to him in the island of *Mauritius* to persons residing in the island, and the purchase-money was a debt due to him at the date of his death.

The second question was with respect to the testator's property in the island of *Mauritius*, which consisted in part of an onerous lease, whether *W. M. Guthrie* could disclaim that lease and accept the rest of the gift, or whether he must either disclaim or accept the whole.

The third question was who was entitled to the rents or income of the *Mauritius* property between the death of the testator and the attainment by *W. M. Guthrie* of the age of twenty-five.

Cookson, Q.C., and *Onslow*, for persons interested in the residue:—

Debts have no locality in law, but follow the person of the creditor: *Nisbett* v. *Murray* (1); *Story's* Conflict of Laws (2). The son *W. M. Guthrie* cannot elect to disclaim the onerous lease; he must either take the whole of the gift made to him or reject it altogether: *Hawkins* v. *Hawkins* (3).

Glasse, Q.C., and *Blakesley*, for *W. M. Guthrie*:—

The debt to the testator was property in the island: *Arnold* v. *Arnold* (4); *Earl of Tyrone* v. *Marquis of Waterford* (5). A legatee is always entitled to disclaim an onerous gift, and it makes no difference that onerous and beneficial properties are

(1) 5 Ves. 149.
(2) § 362 a, § 362 b, § 399.
(3) 13 Ch. D. 470.
(4) 2 My. & K. 365.
(5) 1 D. F. & J. 613.

included in one gift instead of being bequeathed separately: *Jarman* on Wills (1); *Warren* v. *Rudall* (2); *Andrew* v. *Trinity Hall* (3); *Talbot* v. *Earl of Radnor* (4); *Moffett* v. *Bates* (5).

Cookson, in reply:—

The principle is stated thus in *Theobald* on Wills (6): "If the onerous and beneficial legacies are given together as one entire gift, or there is an intention that the legatee shall not take one without the other, he must take all or none;" and this is borne out by *Green* v. *Britten* (7). In *Warren* v. *Rudall* and in *Andrew* v. *Trinity Hall* there were distinct gifts.

Cozens-Hardy, Q.C., and *Inglis Richmond*, for the trustees.

FRY, J.:—

The residuary legatees contend that debts have no locality, and that it is impossible to hold that debts due to a testator resident in *England* are his property in *Mauritius*. The question is one of construction of the clause in the will, and it appears to me that the words "all my estate and effects in the island of *Mauritius*," are sufficient, looking at the connection of the testator with that island, to include debts due to him from persons in that island. One of the earliest cases in which the Courts have had occasion to consider the meaning of general words with reference to debts was *Nisbett* v. *Murray* (8). There a testator who at the time of his death resided in *Jamaica* gave the residue of his estate in the island of *Jamaica*, except furniture and wearing apparel, to trustees. The question arose upon a debt which had been due to the testator from persons resident in the island of *Jamaica*, but for which a person resident in *England* had become solely responsible, and the Court held that the debt had become property in *England*. If the rule had been that which Mr. *Cookson* pressed upon me, that debts follow the person of the creditor, it is plain that in that case the debt would have been held to be

(1) 4th Ed. vol. i. pp. 443, 449.
(2) 1 J. & H. 1.
(3) 9 Ves. 525.
(4) 3 My. & K. 252.
(5) 3 Sm. & Giff. 468.
(6) 2nd Ed. p. 82.
(7) 42 L. J. (Ch.) 187.
(8) 5 Ves. 149.

FRY, J.
1883
GUTHRIE v. WALROND.

property in *Jamaica*, but the Court inquired what was the residence of the debtor.

The same principle guided the decision in *Arnold* v. *Arnold* (1), where the bequest was of the testator's wines and property in *England*, and it was held that the words, "property in *England*," would pass debts due from persons in *England* to the testator who was domiciled in *India*. So that the fact of the domicil of the creditor being Indian, which appears in the report and must have been relied on, did not make a debt due from an English debtor to be property in *India*. Lastly, in the case of *Earl of Tyrone* v. *Marquis of Waterford* (2), the Court of Appeal had to consider the meaning of the expression "land and property" of the testator in the county of *Northumberland*, and it was held that debts due to the testator in respect of collieries in the county of *Northumberland* passed as property in that county. The Lord Chancellor, in delivering judgment in that case, said, "The word 'property' used in this will appears to me to have its most extensive signification. Personal property may have a locality, as we well know from the many cases in the books respecting *bona notabilia*; and in the late case of *Horsfield* v. *Ashton* (3) the House of Lords gave full effect to the doctrine of the locality of personalty where the subject of the gift is intelligibly described."

Lord Justice *Knight Bruce* said (4), "It appears to me that the debts, whether for rent or otherwise, which at the testator's decease were due to him from persons then resident in *Northumberland* were property then in *Northumberland* within the meaning of the will; and that the debts, whether for rent or otherwise, which were then due to him from persons then resident in *Ireland*, were property then in *Ireland* within the meaning of the will;" and Lord Justice *Turner* adopted the same line of reasoning, holding that debts due to the testator at the time of his death being connected with the colliery which was locally situate in *Northumberland* ought to be considered as property in that county.

The whole question is one of intention, and the testator has in my view expressed his intention that this debt shall belong to his son *Walter*.

(1) 2 My. & K. 365.
(2) 1 D. F. & J. 613, 625.
(3) 2 Jur. (N.S.) 193; 6 Jur. (N.S.) 355.
(4) 1 D. F. & J. 628.

The next question is whether the testator's son, *W. M. Guthrie*, is entitled to repudiate or disclaim that part of the gift made to him by the will which is onerous and to take the rest. It appears to me plain that when two distinct legacies or gifts are made by a will to one person he is, as a general rule, entitled to take one and disclaim the other, but that his right to do so may be rebutted if there is anything in the will to shew that it was the testator's intention that that option should not exist. For there are cases in which the Court has held that a legatee has no right to take one gift and leave another, because it has discovered an intention on the part of the testator to couple the two gifts together. But in the present case the question arises upon a single and undivided gift, and it appears to me that such a gift is *primâ facie* evidence that it was the testator's intention that the gift shall be one, and that the legatee shall either take it all or take none of it. It may be that even in such a case the Court would sometimes be able to discover some subtle indication of an intention that the legatee should be at liberty to take part of the gift and leave the rest, but I think that *primâ facie* the fact that there is only one gift is an indication of an intention that the legatee shall take either the whole or none at all. In that conclusion, which appears to me to be consistent with good sense, I am fortified by the decision in *Green* v. *Britten* (1). I hold, therefore, that *W. M. Guthrie* must either take the whole of the testator's estate and effects in the *Mauritius*, or must disclaim the gift altogether.

The question as to the interim income was then argued.

Cookson, Q.C., for persons interested in the residue:—

The income of the *Mauritius* property until the legatee attains twenty-five is undisposed of and falls into the residue: *Edmunds* v. *Waugh* (2); *Jarman* on Wills (3).

Glasse, Q.C., for the legatee:—

The interim income is part of the estate in the *Mauritius*: *Long* v. *Ovenden* (4); *Bullock* v. *Stones* (5).

(1) 42 L. J. (Ch.) 187.
(2) 2 N. R. 408; 4 Drew. 275.
(3) 4th Ed. vol. i. p. 651.
(4) 16 Ch. D. 691.
(5) 2 Ves. Sen. 521.

FRY, J.
1883
GUTHRIE v. WALROND.

Cookson, in reply:—

The principle is that when a specific gift is contingent the income till the happening of the contingency falls into the residue: *Shawe* v. *Cunliffe* (1); *Wyndham* v. *Wyndham* (2). This is a purely contingent gift; not a gift vested in possession, the enjoyment only being postponed. That is the distinction.

FRY, J.:—

I think the law is plain that when a specific legacy is given on the happening of a contingency the interest upon it, and any accretions to it before the happening of the contingency, fall into the residue of the testator's estate, or go to his next of kin, as the case may be. But when a specific legacy is vested at once in the legatee, and the enjoyment only is postponed until the happening of the contingency, the interim interest and accretions go to the legatee. The first proposition is laid down in *Wyndham* v. *Wyndham* and *Shawe* v. *Cunliffe*, and it is so stated in *Roper* on Legacies (3). In the present case, as not only the enjoyment of the legacy is postponed, but the vesting itself is contingent, it follows that the interim income falls into the residue. Till the legatee attains twenty-five the income of the *Mauritius* property falls into the residue, and the burden of that property must be borne by the residue.

Solicitors for all parties: *Frere & Co.*

(1) 4 Bro. C. C. 144. (2) 3 Bro. C. C. 58.
(3) 4th Ed. vol. ii. pp. 1305 *et seq.*

W. L. C.
C. W. C.

FEARNSIDE *v.* FLINT.

FRY, J.
1882
Dec. 9, 19.
1883
Jan. 16.

[1863 F. 2.]

Statute of Limitations—Mortgage Debt—Collateral Bond—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

When a mortgage debt is secured by a collateral bond the remedy on the bond is, under sect. 8 of the *Real Property Limitation Act*, 1874, barred by the lapse of twelve years since the last payment of interest or acknowledgment of the debt, equally with the remedy against the land comprised in the mortgage.

Sutton v. *Sutton* (1) followed.

ADJOURNED SUMMONS.

This suit was instituted in the Court of Chancery in the year 1863 for the administration of the estate of *George Flint*, who died on the 29th of April, 1860. An administration decree was made on the 28th of February, 1863.

On the 23rd of March, 1832, *Leonard Flint*, a brother of *George Flint*, executed a conditional surrender of certain copyhold hereditaments, by way of mortgage to secure the repayment of £400, with interest, to *Thomas Knowlton*. The mortgage debt and interest were also secured by a collateral bond of the same date given by *Leonard Flint* to *Knowlton*, by which the heirs of *Leonard Flint* were bound. Before the year 1847, *Leonard Flint* died, leaving *George Flint* his heir according to the custom of the manor of which the copyholds were held. In 1847, *George Flint* entered into an agreement to sell part of the copyholds to the *York and North Midland Railway Company*, and the purchase-money was afterwards paid into Court to the credit of this suit. Interest on the mortgage debt was paid down to the year 1847, but no interest was paid afterwards.

George Flint by his will, dated the 20th of March, 1860, devised and bequeathed all his real estate and the residue of his personal estate to trustees, upon trust for sale and conversion. And he declared that the trustees should hold the proceeds of the sale and conversion upon trust to pay all his just debts, funeral

(1) *Ante*, p. 511.

FRY, J.
1883
FEARNSIDE
v.
FLINT.

and testamentary expenses, and upon certain other trusts which it is not necessary to state. On the 24th of December, 1862, a letter was written by the solicitors of the trustees of the will to the solicitors of the personal representative of *Knowlton*, which, it was said, amounted to an acknowledgment of the mortgage debt, but there was no acknowledgment of later date. On the 25th of October, 1882, the personal representative of *Knowlton* took out a summons in the suit, asking that he might be at liberty to go in and prove against the estate of *George Flint* for the amount due on the bond of the 23rd of March, 1832, to *Knowlton's* estate.

Everitt, Q.C., and *F. Thompson*, for the summons:—

Though by sect. 8 of the *Real Property Limitation Act*, 1874 (1), the period of limitation for the recovery of money secured by mortgage has been reduced to twelve years, this does not apply to the remedy upon a collateral bond, but the period of limitation in relation to the bond is still twenty years from the date of the last acknowledgment of the debt.

The letter of the 24th of December, 1862, contained a sufficient acknowledgment of the bond debt by the right persons, and it was given less than twenty years before the present summons was taken out.

(1) Sect. 8: "No action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto, or his agent, and in such case no such action, or suit, or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

Sect. 10: "After the commencement of this Act, no action, suit, or other proceeding, shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust."

Glasse, Q.C., and *Lawson*, for the trustees:—

If the remedy on the mortgage is gone, how can the collateral remedy on the bond remain? It has been decided by the Court of Appeal in *Sutton* v. *Sutton* (1) that when the remedy for a mortgage debt against the land comprised in the mortgage is barred by the lapse of twelve years, the remedy on the personal covenant of the mortgagor, contained in the mortgage deed, to pay the debt is also barred by sect. 8. The principle of this decision applies equally to a collateral bond given to secure the mortgage debt.

Alfred Smith, and *J. Cutler*, for other parties.

Everitt, in reply:—

The trust to pay debts contained in the will prevents the statute from running: *Hughes* v. *Wynne* (2). *Sutton* v. *Sutton* is distinguishable.

Glasse, in reply:—

The old distinction between a charge of debts and an express trust to pay debts has been abolished by sect. 10 of the Act of 1874. An express trust does not now prevent the statute from running.

1883. Jan. 16. FRY, J. [after stating the facts], continued:—

The letter which has been relied upon as an acknowledgment of the debt was written on the 24th of December, 1862. The present application was made on the 25th of October, 1882. The applicant claims to receive this money on the ground that it was a just debt of the testator, *George Flint*, and that as such he is entitled to payment of it. It appears to me that the claim cannot be substantiated. The decision of the Court of Appeal in *Sutton* v. *Sutton* has determined that a sum of money secured by a mortgage upon land, and also secured by a covenant of the mortgagor in the mortgage deed, is to be treated as one and the same sum; so that when the right of suit or action in respect of the land is gone, the right on the covenant ceases also. It

(1) *Ante*, p. 511. (2) T. & R. 307.

FRY, J.
1883
FEARNSIDE
v.
FLINT.

appears to me that no distinction can exist between a covenant contained in a mortgage deed and a collateral bond given at the same time as the mortgage.

It is only necessary for me to refer to sects. 8 and 10 of the Act of 1874, which came into operation on the 1st of January, 1879. [His Lordship read sect. 10, and continued:—] That, in my judgment, prevents the trust created by the will of *George Flint* from enlarging the time within which the present application could be made. [His Lordship then read sect. 8, and continued:—] In the present case it appears that the last payment of interest was made in the year 1847: the last, or the only, acknowledgment of the debt, if acknowledgment it was (I assume for the present purpose that it was) was made in December, 1862. The present proceeding was taken more than twelve years after the last payment of interest and after that acknowledgment. Assuming, therefore, that the letter operated as an acknowledgment, and that the debt was a just debt of *George Flint* at that time, it appears to me the present claim is barred by the statute. Consequently, I dismiss the summons with costs.

Solicitors for Claimant: *W. W. Wynne & Son*, agents for *H. Forshaw & Hawkins, Liverpool.*

Solicitors for Trustees: *Redpath & Holdsworth*, agents for *Shackles & Son, Hull.*

Solicitor for other Parties: *A. E. Copp.*

W. L. C.

In re BUCKLEY'S TRUSTS.

FRY, J.

1883

Jan. 19.

Infant—Maintenance—Accumulations—Defeasible Estate — Lord Cranworth's Act (23 & 24 *Vict. c.* 145), *s.* 26 [*Revised Ed. Statutes, vol. xiii. p.* 919].

Property was bequeathed to trustees in trust for an infant, with a gift over in case of his death under twenty-one.

The trustees accumulated the income of the property not required for his maintenance, in pursuance of the powers given by sect. 26 of *Lord Cranworth's Act.*

The infant died under twenty-one.

Held, that the accumulations of income to the time of the death of the infant belonged to the infant, and were not to be held for the benefit of the remainderman who ultimately became entitled to the property from which the accumulations arose.

W. T. BUCKLEY died in December, 1875, having by his will, dated in November, 1875, bequeathed money secured on a mortgage to trustees in trust for his nephew, *R. T. Buckley*, subject to a proviso that if the said *R. T. Buckley* should not live to the age of twenty-one years the mortgage debt and the legal estate in the mortgaged property should become part of his residuary estate. The will provided that *Lord Cranworth's Act* (23 & 24 Vict. c. 145) should apply. The testator gave his residuary estate to the Petitioners as trustees for persons some of whom were infants.

R. T. Buckley died under the age of twenty-one years, but during his life the income received under the mortgage, which was not required to be used for his maintenance, was received by the trustees and invested and accumulated.

These accumulations had been paid into Court under the *Trustee Relief Act*, and this was a petition on behalf of the persons entitled to the residue of the testator's estate to have the accumulations paid out to them, on the ground that sect. 26 of *Lord Cranworth's Act*, after empowering trustees to maintain infants out of funds contingently belonging to them, directs that accumulations not so applied shall belong to the persons entitled to the principal (1).

(1) *Lord Cranworth's Act*, 1860 (23 & 24 Vict. c. 145), s. 26, provides that "In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one

FRY, J.
1883
In re BUCKLEY'S TRUSTS.

Hall, for the petition:—

The infant was not entitled to this fund except defeasibly, and his interest has failed; therefore the accumulations go to the persons entitled under the gift over.

Micklem, for the representatives of the deceased infant:—

The income belonged to the infant down to the time of the gift over taking effect: *Taylor* v. *Johnson* (1). The object of the Act is to benefit infants, not to take away what previously belonged to them.

FRY, J.:—

The question before me arises under the 26th section of *Lord Cranworth's Act*, which was incorporated by the testator into his will. Now there are three ways in which a legacy may be given. The first case is where it is given to *A. B.* absolutely, the second case is where it is given to *A. B.* contingently on his attaining twenty-one, or on some event happening or not happening, and the third case is where the gift is absolute in the first instance, but liable to be defeated on the legatee not attaining twenty-one, or on the happening or not happening of some future event.

In the first case, the accretions of income not required for maintenance belong, independently of the Act, to the person who takes absolutely. In the second case, it is also plain that the accumulations would be taken or not taken by the legatee according to whether the contingency happened or not; while in the third case it is plain that the accumulations would go until the happening of the defeasance to the person entitled unless the defeasance happened. That I take to have been the law until the passing of the Act. Now the statute is in these words: "In all cases where

years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property; . . . and such trustees shall accumulate all the residue of such income by way of compound interest . . . for the benefit of the persons who shall ultimately become entitled to the property from which such accumulations shall have arisen."

(1) 2 P. Wms. 504.

any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful." So the Act appears to provide for the two cases of an absolute legacy and a contingent legacy, and enacts that in those cases the infant may be maintained out of income, and that the accumulations of income or residue thereof shall be held for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen.

If, therefore, the operation of the statute is confined to the cases of an absolute or contingent legacy, it makes no alteration in the previously existing law applicable to this case; but if I hold that the statute also applies to an absolute gift liable to be defeated, I shall be depriving a person defeasibly entitled to the principal, of the income he would otherwise be entitled to. If I thought that it was clear that the statute made such an alteration I should have to decide in favour of the Petitioners, but looking to the preamble, which shews that the principal object of the statute was to save the insertion of clauses usually inserted in deeds and wills, I think that the better construction is to hold that it was not intended to alter the law applicable to the case before me, and I shall therefore declare that the representatives of the infant are entitled to the accumulations.

Solicitor for all parties: *R. H. Greenbank.*

C. W. C.

FRY, J.
1883
Jan. 19, 20.

In re SMITH.
GREEN *v.* SMITH.

[1881 S. 5470.]

Bankruptcy—Undischarged Bankrupt—Close of Bankruptcy—Death of Bankrupt—Rights of Creditors—Set-off—Mutual Credit Clause—Administration Action—Insolvent Estate—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 39, 47, 54—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

24 Ch D 676-9

When a bankrupt has not obtained an order of discharge, a creditor who has proved in the bankruptcy, and who is being sued by the bankrupt, or by his executor, after his death, for a debt due to the bankrupt on a contract entered into after the commencement of the bankruptcy, cannot, during the period of three years from the close of the bankruptcy, set off the unpaid balance of his proved debt against the sum claimed in the action.

The scope of the *Bankruptcy Act*, 1869, is that, during the period of three years after the close of the bankruptcy, none of the creditors who could prove in the bankruptcy shall be able to obtain a preference over the others, and that after the expiration of the three years, the unpaid balances of the proved debts shall be enforced against the property of the debtor only under the direction of the Court of Bankruptcy, so that any sums which may be thus recovered may be distributed among the creditors who have proved *pari passu*.

The mutual credit clause (sect. 39) of the *Bankruptcy Act*, 1869, will not be applied in the administration of the estate of a deceased person until it is shewn that the estate is insolvent, but the Court may direct that a debt claimed on behalf of the estate from a creditor shall be paid into Court to a separate account, with liberty to the creditor to apply, in case the estate shall prove to be insolvent.

Adjourned summons.

This action was brought by a creditor for the administration of the personal estate of *Richard Smith*, who died intestate on the 15th of June, 1881. The Defendant was his administratrix. On the 30th of October, 1877, *Smith* was adjudicated a bankrupt. Messrs. *Bell, Nott, & Co.*, who had had some dealings with him, proved in the bankruptcy for a sum of £2193 19*s.* 10*d.*, due to them by *Smith*, in respect of which they received, in September, 1879, and May, 1880, two dividends amounting to £165 13*s.* 10*d.* On the 10th of December, 1880, an order was made by the Court of Bankruptcy closing the bankruptcy. It did not appear whether

L. R. 10 Ch App 141 (1874) 153

a release was granted to the trustee. The bankrupt did not obtain an order of discharge.

In October, 1879, he entered into an agreement with *Bell, Nott, & Co.*, that they should make purchases and sales of cotton on his account, and he deposited with them a sum of £191 10*s.* 9*d.* as "margin." On the 3rd of November, 1879, *Bell, Nott, & Co.* wrote to him as follows:—

"We credit you £191 10*s.* 9*d.* 'margin' on 200 bales American cotton Novr./Decr. delivery, bought from *Eskrigge, Pooley, & Co.*, on 31st ult. on your account. Any profit realized on this, or on any further purchases of cotton on your account, to be applied, half in reduction of balance due to us per account to Decr. 31st, 1876, and the other half to be paid to you, or retained as margin against more extended purchases, if you prefer it. Please confirm this letter."

On the following day *Smith* wrote to *Bell, Nott, & Co.* confirming their letter. After *Smith's* death *Bell, Nott, & Co.* delivered to his administratrix an account of their dealings in cotton under the terms of the letter. This account shewed that on the 31st of October, 1881, the balance to the credit of the account was £284 12*s.* 8*d.* Deducting from this sum the margin of £191 10*s.* 9*d.*, originally deposited by *Smith*, the profit of the transactions amounted to £93 1*s.* 11*d.*, of which a moiety (£46 10*s.* 11*d.*) belonged under the terms of the agreement to *Bell, Nott, & Co.*, and there consequently remained a balance of £238 1*s.* 9*d.* due by them to *Smith*. The account shewed that on the 16th of January, 1880, the balance in *Smith's* favour had been £284 2*s.* On the 15th of June, 1881, as already stated, *Smith* died; on the 2nd of December, 1881, the administration action was commenced; and on the 20th of December, 1881, the ordinary administration judgment was given. On the 18th of April, 1882, *Bell, Nott, & Co.* carried in under the administration judgment a claim to prove for £1790 4*s.* 3*d.*, being the balance of the sum of £2193 19*s.* 10*d.* after giving credit for £165 13*s.* 10*d.* (the amount of the dividends received by them in the bankruptcy) and £238 1*s.* 9*d.*, the balance due to the intestate on the account of the cotton transactions.

On the 26th of October, 1882, the administratrix took out a

FRY, J.
1883
In re SMITH.
GREEN v. SMITH.

summons calling on *Bell, Nott, & Co.* to shew cause why they should not pay to the applicant the sum of £238 1*s.* 9*d.* which they admitted to be due from them to the estate of the intestate.

Cooper Willis, Q.C., and *W. W. Cooper*, for the summons:—

The Respondents are not entitled to the set-off which they claim. No creditor of a bankrupt who has a provable debt, can have any remedy against the bankrupt's property, except under the *Bankruptcy Act*, and if the bankrupt does not obtain a discharge, no provable debt can after the close of the bankruptcy be enforced against the bankrupt's property till after the expiration of three years, and then only under the direction of the Court of Bankruptcy (1); *Bankruptcy Act*, 1869, sects. 12, 47, 54: *In re*

(1) Sect. 12: "Where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt, except in manner directed by this Act. But this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed."

Sect. 47: "When the whole property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can, in the joint opinion of the trustee and committee of inspection, be realized without needlessly protracting the bankruptcy, or a composition or arrangement has been completed, the trustee shall make a report accordingly to the Court, and the Court, if satisfied that the whole of the property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can be realized without needlessly protracting the bankruptcy, or that a composition or arrangement has been completed, shall make an order that the bankruptcy has closed, and the bankruptcy shall be deemed to have closed at and after the date of such order."

Sect. 54: "Where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:

"(1.) No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy; and, during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his property during the bankruptcy, make up ten shillings in the pound, he shall be entitled to an order of discharge, in the same manner as if a dividend of ten shillings in the pound had originally been paid out of his property.

"(2.) At the expiration of a period of three years from the close of the bankruptcy, if the

Pettit's Estate (1); *Ex parte Rhodes* (2); *Ex parte Kelly* (3); *Robson's* Bankruptcy (4).

Byrne, for the trustee, consented to the order asked for.

Yate Lee, for *Bell, Nott, & Co.*:—

The analogy of the old *Insolvent Debtors Acts* applies.

[FRY, J.:—Is not the object of sects. 12 and 54 to prevent any creditor from gaining any benefit except through the machinery provided by the Act?]

It may be so if the bankrupt is alive. It was formerly decided that after the death of an insolvent debtor a creditor could maintain a suit in equity to administer his assets in discharge of his debts: *Barton* v. *Tattersall* (5); *Ward* v. *Painter* (6). The latter case was recognised in *Ex parte Kelly*.

There is nothing in the *Bankruptcy Act* to deprive us of the statutory right of set-off. We have also a right to a set-off under the mutual credit clause (sect. 39) of the *Bankruptcy Act*. That section is imported by sect. 10 of the *Judicature Act*, 1875, into the administration of the insolvent estates of deceased persons: *Rose* v. *Hart* (7); *In re West of England Bank* (8).

But in truth there is no debt due from us to the administratrix. The account shews that in January, 1880, a larger balance

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debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the meantime) shall be deemed to be a subsisting debt in the nature of a judgment debt, and, subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor, with the sanction of the Court which adjudicated such debtor a bankrupt, or of the Court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in manner directed by such Court, and after giving such notice and doing such acts as may be prescribed in that behalf."

(1) 1 Ch. D. 478.
(2) 15 Ves. 539, 541.
(3) 7 Ch. D. 161.
(4) 4th Ed. p. 654.
(5) 1 Russ. & My. 237.
(6) 5 My. & Cr. 298.
(7) 8 Taunt. 499.
(8) 12 Ch. D. 823.

FRY, J.
1883
In re SMITH. GREEN *v.* SMITH.

than that which is now claimed was due from us to the bankrupt, and the bankruptcy was not closed till December, 1880. That balance, which included the sum now claimed, therefore vested in January, 1880, in the trustee. On the closing of the bankruptcy, whether the trustee obtains a release or not, he is *functus officio*, and the property of the bankrupt then passes from him and vests in the Registrar of the Bankruptcy Court as trustee, and he, not the administratrix, is the proper person to receive it. The late trustee cannot give a valid consent to its being paid to the administratrix: *Bankruptcy Act*, 1869, sects. 4, 15, 17, 47, 51, 52, 83; Bankruptcy Rules, 1870, r. 125. We should have no defence to a demand by the Registrar as trustee.

Cooper Willis, in reply:—

An undischarged bankrupt has a right to sue in respect of property acquired by him after the close of the bankruptcy, provided that the trustee does not intervene: *Jameson & Co.* v. *Brick and Stone Co.* (1). The sum claimed represents profits made by the bankrupt after the close of the bankruptcy. As a matter of fact all the creditors have come in to prove in the administration action.

FRY, J. (after stating the facts, and observing that *Bell, Nott, & Co.* had submitted to the jurisdiction and stood in the same position as if an action had been brought against them by the administratrix, continued:—)

The balance of £238 1*s.* 9*d.* due from *Bell, Nott, & Co.* to the intestate's estate, consists of the £191 10*s.* 9*d.* originally deposited by him, plus half the profits realized by the speculations. So far everything is clear. *Bell, Nott, & Co.* assert that they have a right to set off against this balance the unpaid balance of the larger amount due to them by the intestate before the bankruptcy. Mr. *Yate Lee* relies upon the *Statute of Set-off*, and in answer to this it is suggested that the *Bankruptcy Act*, 1869, has deprived the Respondents of any such right. [His Lordship read sect. 12 of the Act.] Pausing there, I must first inquire whether the right of set-off is a "remedy against the property of the bankrupt." It appears to me that it comes well within such a description. It is

(1) 4 Q. B. D. 208.

a remedy enabling the Respondents to retain money which would otherwise be received by the administratrix. [His Lordship then referred to sects. 47 and 54.] Sect. 54 provides what is to happen after the close of a bankruptcy in case the bankrupt has not obtained an order of discharge. It provides, first, that no portion of a debt provable under the bankruptcy shall be enforced against the property of the bankrupt until the expiration of three years from the close of the bankruptcy; and, secondly, that at the expiration of the three years, if the bankrupt has not obtained a discharge, any balance remaining unpaid in respect of any debt proved in the bankruptcy, shall be deemed to be a subsisting debt in the nature of a judgment debt, and, subject to the rights of any new creditors, may be enforced against any property of the bankrupt with the sanction of the Court of Bankruptcy, "but to the extent only, and at the time and in manner directed by such Court."

It appears to me plain that the scope of the Act is this, that the remedies of persons who can prove their claims in a bankruptcy are to be confined to their remedies in the bankruptcy; that all property which is acquired by the bankrupt before the close of the bankruptcy is to be distributed among the creditors *pari passu*; that pending the period of three years from the close no creditor is to be allowed to gain an advantage over the others; and that if the bankrupt does not obtain his discharge during the three years, the balance of the debts remaining unpaid is to be enforced in one manner only, viz., under the direction of the Court of Bankruptcy, the intention being that any funds realized in this way shall be distributed equally among all the creditors. It is evident that to allow one creditor to enforce his debt by means of set-off would result in his obtaining a preferential remedy over the other creditors, and, to the extent to which he succeeded in doing this, property would be diverted which would otherwise feed the fund available for all the creditors.

It seems to me that if I were to allow this set-off I should be going contrary both to the words and to the spirit and scope of the Act. In that view I am confirmed by the case of *Francis* v. *Dodsworth* (1). There it was held that, although a discharge

(1) 4 C. B. 202.

FRY, J.
1883
In re SMITH. GREEN v. SMITH.

under the *Insolvent Debtors Act* (1 & 2 Vict. c. 110), does not operate as a complete extinguishment of a debt scheduled, the creditor is not entitled to plead such debt by way of set-off to an action brought against him by the insolvent for a demand accruing subsequently to his discharge. The Court held that as the debt sought to be set off was not one for which, under the circumstances, the creditor could have maintained an action, it could not be made available by way of set-off.

The principle on which the Court there proceeded was, *mutatis mutandis*, that which I have already mentioned. I think the spirit and intention of the Act was to give one remedy for the benefit of all, and to keep the enforcing of that remedy subject to the discretion of the Court of Bankruptcy, and that even if the exercising a right of set-off is not expressly excluded by the words of the Act, it is inconsistent with the spirit.

Then arises the second question which has been raised as to the title of the trustee. The debt in question arises out of a contract entered into by the bankrupt after the commencement of the bankruptcy. But the rule is that a bankruptcy cannot be set up by a third party as a defence to an action, unless the trustee intervenes, and in this case the trustee has appeared by counsel, and does not oppose the order which is asked for.

Then it is said that, by sect. 10 of the *Judicature Act*, 1875, the mutual credit clause (sect. 39) of the *Bankruptcy Act* is imported into the administration of insolvent estates. But there is no *constat* that this estate is insolvent, and it is not admitted that it is. The only question is whether I ought to direct an inquiry as to that.

After some discussion

His LORDSHIP ordered the sum in question to be paid into Court to a separate account, with liberty to *Bell, Nott, & Co.* to apply, in case it should appear that the estate was insolvent.

Solicitors: *J. J. & C. J. Allen; G. L. P. Eyre & Co.*, agents for *Garnett & Tarbet, Liverpool.*

W. L. C.

In re DEVALA PROVIDENT GOLD MINING COMPANY.

FRY, J.

1883

Jan. 20, 22.

Evidence—Admissibility—Statement by Agent—Company—Director—Rectification of Register.

A shareholder in a company applied to have his name removed from the register of members on the ground that he had been induced to become a shareholder by a material mis-representation in a prospectus issued by the company. The only evidence of the untruth of the representation was a statement made by the chairman of the company in a speech addressed by him to a meeting of the shareholders:—

Held, that this statement was not admissible evidence against the company, inasmuch as the chairman in making it was not acting as the agent of the company in a transaction between them and a third party, but was making a confidential report to his own principal.

Meux's Executors' Case (1) distinguished.

ADJOURNED SUMMONS.

This was a summons by *J. N. Abbott* asking that the register of members of the above company might be rectified by striking out the name of the applicant as the holder of 600 shares.

The company was formed by registration under the *Companies Acts* in August, 1880. A prospectus inviting applications for shares was issued by the company, which *Abbott* having seen, he on the 18th of August applied for an allotment of 600 shares, and that number of shares was allotted to him. He paid the sum of 5*s.* per share, half on application, and half on allotment, and his name was placed on the company's register as the holder of the shares. He now alleged that the prospectus, on the faith of which he applied for the shares, contained a material misrepresentation. The prospectus stated that the company was formed for the purpose of working as a gold mining company an estate known as the "*Provident*," situate near *Devala*, in *Madras*, and it went on to state that "the title carries all rights to minerals." The latter allegation was said to be untrue. The statutory meeting of the shareholders of the company was held on the 20th of November, 1880, and at that meeting the chairman made a speech, in the course of which he said, "We had hoped to come before you to-day with some report from the property, but unfortunately we have to content ourselves with announcing to you that we have

(1) 2 D. M. & G. 522.

FRY, J.
1883
In re DEVALA PROVIDENT GOLD MINING COMPANY.

been able, only about ten days ago, to take possession of the estate, in consequence of the inability of the vendors to comply with the conditions of the contract. We have, therefore, thought it well, in the interests of the shareholders, to assist the vendors in obtaining what was wanting, viz., the mining rights. Upon the arrival of the deeds in connection with our affairs, it soon became apparent that these mining rights were not stipulated for, and we, as I have said, aided the vendors in obtaining these mining rights from the Government. Anyhow, we saw that, for some considerable time to come, we could not obtain the mining rights in their entirety, as they were held out in the prospectus—in fact, we found that they were restricted, and under those circumstances we reconsidered the original contract, and in the end varied it in accordance with the powers given to us by the articles of association. By the present Government regulations a grant of mining rights is only given to the extent of thirty acres at one time in any land over which the Government claims control. The Government could not interfere in any way with the rights of the possessors of land, but they do not grant to outsiders the rights which they refuse, when they are able, to the possessors of land. They give us exclusive mining rights over the whole of our property, but they restrict us to the exercise of them upon only thirty acres at a time. Such, gentlemen, is the position of the property at the present moment. The vendors conveyed to us all rights—mining rights included. The Government sanctions them, but restricts us to working only thirty acres at a time, which for a mining enterprise is a very large area indeed, and is amply sufficient for the most powerful company to work. We, therefore, shall not be in the least impeded by being restricted to these thirty acres."

This was the only evidence adduced by the Applicant to shew that the statement in the prospectus was untrue. *Abbott* was not present at the meeting, but a printed copy of the chairman's speech was circulated among the shareholders, a copy being posted to *Abbott's* address.

Swinfen Eady, for the summons :—

The misrepresentation alleged was material, and it is admitted by the speech of the chairman.

Cookson, Q.C., and *W. R. Kennedy*, for the company:—

The statement of the chairman does not estop the company, it is not even admissible evidence against them.

Swinfen Eady, in reply:—

Evidence may be given against companies of admissions made by their directors or agents relating to matters within the scope of their authority: *Roscoe* on Evidence (1); *Meux's Executors' Case* (2).

[FRY, J.:—Was the chairman of the company in making the speech at the meeting acting as the company's agent as against *Abbott?*

Cookson:—In *Taylor* on Evidence (3), it is said, "The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending, and *dum fervet opus.*"]

The statement was within the scope of the chairman's authority. At any rate it is admissible evidence, and it is not contradicted. The company themselves have put the report in evidence as a true report of what the chairman said, and it is admissible against them.

FRY, J., after stating the facts, continued:—

No evidence on oath is tendered in support of the allegation of misrepresentation in the prospectus, but the Applicant relies on the statement made by the chairman of the company at a meeting of the shareholders on the 20th of November, 1880. The first inquiry, therefore, is whether this statement is or is not admissible evidence against the company. Now the rules which limit the admissibility in evidence of statements not made on oath are somewhat stringent, and the only ground upon which, in my view, this statement could possibly be admitted would be that the chairman was the agent of the company, and that he was making the statement in the course of a transaction with a third party in

(1) 14th Ed. p. 72. (2) 2 D. M. & G. 522.
(3) 7th Ed. vol. i. p. 513.

FRY, J.
1883
In re DEVALA PROVIDENT GOLD MINING COMPANY.

which he was acting as the agent of the company, and that it was within the scope of his agency. If that were so, the statement would be admissible against the company. It appears to me, however, that it is not admissible, for it was made by the agent, not in a transaction between the company and a third party, but at a meeting of the company. It is the case of an agent making a report to his own principal, and, in my view, when an agent is making a confidential report to his principal the report is not admissible evidence in favour of a third party. It is said that *Abbott* was not a third party, but was a member of the company, and in that view the chairman was his agent and was making the report to him as one of his principals. It does not appear to me that there is either principle or authority which justifies the use of a statement made by the common agent of two principals as evidence on behalf of one of the principals against the other. I think this case does not fall within any of the authorities which have been cited. In *Meux's Executors' Case* (1) the statement was made by an officer of the company in a transaction between the company and a third party; the statement was part of the transaction. And, if I were to regard only the question of convenience and inconvenience, it appears to me that it would be highly inconvenient to extend the rule. If the statement made by one officer of the company is admissible against them, the statements made by every other officer would be equally admissible, and there might be conflicting statements. This would be highly inconvenient. I hold, therefore, that the statement of the chairman is not admissible, and consequently that there is no evidence of misrepresentation upon which I can act.

His Lordship then stated that, in his opinion, the alleged misrepresentation was immaterial, and that the Applicant had delayed too long before making his application.

The summons was accordingly dismissed, with costs.

Solicitors for Applicant: *Morley & Shirreff.*
Solicitors for Company: *Robins & Cameron.*

(1) 2 D. M. & G. 522.

W. L. C.

In re BODDINGTON.
BODDINGTON *v.* CLARIAT.

[1882 B. 3587.]

FRY, J.
1883
Jan. 23.

Will—Legacy—Misdescription of Legatee—Legacy given for particular Purpose—Gift of Annuity to Wife during Widowhood—Invalid Marriage.

A testator by his will gave the proceeds of sale of his residuary estate to trustees, on trust to pay to his wife *E. C.*, within one month after his decease, a legacy of £200, and in addition thereto to pay to his said wife, "so long as she shall continue my widow and unmarried," an annuity of £300, commencing from the date of his decease, "or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of £2000. And I direct that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my estate."

After the date of the will the marriage was, in a suit in the Divorce Court instituted by the wife, declared void *ab initio*, on the ground of the impotency of the testator. He died without altering his will:—

Held, that the late wife was entitled to the legacy of £200, but that she could not claim the annuity inasmuch as she, never having been in law the wife of the testator, never could be or continue his widow, and the annuity was therefore given for a period which could never come into existence:

Held, also, that she could not take the £2000 which was given in substitution for the annuity to which she was not entitled.

Observations on *Rishton* v. *Cobb* (1).

THOMAS BODDINGTON, on the 23rd of October, 1879, married *Emily Caroline Halpen*. On the 23rd of December, 1879, he made his will and thereby gave the proceeds of sale of his residuary estate to trustees, who were also his executors, on trust for investment, and to stand possessed thereof and of the income "on trust to pay to my wife, *Emily Caroline Boddington*, within one month after my decease, a legacy of £200, and in addition thereto to pay to my said wife, so long as she shall continue my widow and unmarried, one annuity of £300 by equal quarterly instalments, commencing from the date of my decease, or otherwise in lieu and in substitution of the said annuity, at the option of my said wife if she shall prefer it, a legacy of £2000. And I direct that the provision hereby made for my said wife shall be in lieu and

(1) 5 My. & Cr. 145.

FRY, J.
1883
In re BODDINGTON.
BODDINGTON *v.* CLARIAT.

satisfaction of any dower or thirds to which she might be entitled out of my said estate." In 1880 *Emily Caroline Boddington* instituted a suit in the Probate and Divorce Division for nullity of marriage by reason of the impotency of her husband, and on the 4th of August, 1880, a decree *nisi* was made, declaring the marriage to have been and to be absolutely null and void by reason of the husband's impotency, and on the 5th of April, 1881, this decree was made absolute. The testator died on the 19th of July, 1881. The wife claimed from the executors payment of the legacy of £200 and the annuity bequeathed to her by the will. The trustees refused to pay, on the ground that she never had been the testator's wife. She then commenced this action against the trustees for the administration of the testator's estate. By their statement of defence the Defendants said that the Plaintiff never answered the description in the will of the wife of the testator. They also said that, after the decree absolute had been made, the testator, for the purpose of providing for the Plaintiff, paid to her the sum of £6000, and that she on the 10th of April, 1881, signed a receipt in the following terms: "I hereby acknowledge that all the arrangements entered into on the part of *Thomas Boddington* and myself by our respective solicitors, to take effect on the decree *nisi* for nullity of marriage pronounced on the 4th of August, 1880, in the action lately pending between us in the Divorce Court, being made absolute, have been duly carried out, such decree *nisi* having been made absolute on the 5th of April, 1881, and that, in fulfilment of such arrangements on the part of the said *Thomas Boddington*, I have this day received the sum of £6000 deposited by him as the provision to be made for me consequent on the decree being made absolute, and that I also received all sums ordered to be paid by him to me for alimony pending the said action, together with a further sum of £83 6*s.* 8*d.* agreed to be allowed by him to me to this date." The Defendants admitted assets, but denied that the Plaintiff was entitled to any interest under the will.

Cozens-Hardy, Q.C., and *Finch*, for the Plaintiff:—

The Plaintiff is entitled to the £200 legacy. The description of her as the wife of the testator is merely a misdescription;

there is no doubt as to her identity. When a legatee is described by a character which he does not fill the legacy does not fail, unless the supposed character is the motive of the gift, and he has fraudulently assumed the character and deceived the testator: *Kennell* v. *Abbott* (1); *Schloss* v. *Stiebel* (2); *Giles* v. *Giles* (3); *Doe* v. *Rouse* (4); *Wilkinson* v. *Joughin* (5).

The Plaintiff is also entitled to the annuity. The words "so long as she shall continue my widow" may be rejected as inapplicable, and then the Plaintiff will take an annuity either for her life or in perpetuity: *Rishton* v. *Cobb* (6). In that case a bequest of £2000 was made to trustees, on trust to authorize *C.*, widow of *N.*, to receive the income "so long as she shall continue single and unmarried," but in case she should dispose of or anticipate the income, the testator revoked the bequest, and directed that the £2000 should become part of the residue of his estate. *C.* had been the widow of *N.*, but at the date of the will she had married *R.*, though this fact was not known to the testator. Lord *Cottenham* held that *C.* took an absolute interest in the £2000. At any rate, the Plaintiff has an option to take the £2000 legacy in lieu of the annuity, and the £2000 is not made dependent on widowhood.

Davey, Q.C., and *Langworthy*, for the Defendants:—

Rishton v. *Cobb* is not an easy case to understand; the only explanation is that on the construction of the particular will the Court thought there was an absolute gift to the legatee. No doubt a mere misdescription of the legatee will not avoid a legacy. The Court cannot speculate about the testator's motives, but it is entitled to look at the whole will, and if it appears that the legacy was given in the discharge of a supposed legal or moral obligation, that is a circumstance to be taken into account. In many cases of portions to children it has been held that, if a testator has discharged the obligation of providing for his child by a gift in his lifetime, the child cannot have a double fortune; he cannot have a legacy which was intended as a portion.

[FRY, J.:—There is a presumption in the case of a child that

(1) 4 Ves. 802.
(2) 6 Sim. 1.
(3) 1 Keen, 685.
(4) 5 C. B. 422.
(5) Law Rep. 2 Eq. 319.
(6) 5 My. & Cr. 145.

FRY, J.
1883
In re BODDINGTON. BODDINGTON *v.* CLARIAT.

the testator intends to discharge his obligation to provide for it, but no such presumption arises in the case of a wife.]

The words at the end of the gift shew the testator's motive; he meant the annuity to take the place of the dower to which he supposed the Plaintiff would be entitled as his wife. This has the same effect as the legal presumption in the case of a child, and distinguishes the case from *Pankhurst* v. *Howell* (1). The principle is illustrated by *Monck* v. *Monck* (2); *Debeze* v. *Mann* (3). The Plaintiff by her own act deprived herself of the *status* of wife; she would have retained it if she had not instituted the suit in the Divorce Court. In *Rishton* v. *Cobb* (4) the gift, being of the income of a particular fund, shewed that the annuity was intended to be perpetual; a mere annuity is always presumed to be limited to the life of the annuitant. In the present case it is clear that a perpetual annuity was not intended: *Jarman* on Wills (5). If the Plaintiff is not entitled to the annuity, she cannot have the £2000 which is only given in lieu of it.

Cozens-Hardy, in reply:—

There is no real distinction between this case and *Rishton* v. *Cobb*. There the Court gave effect to the primary intention of the testator, rejecting particular words. Why should not the Plaintiff have the £2000, even if she cannot take the annuity? Suppose a testator gave *Blackacre* to *A.*, and gave him an option to take *Whiteacre* instead; would the gift of *Whiteacre* fail if the testator had sold *Blackacre* in his lifetime?

[FRY, J.:—In that case the difficulty would arise by reason of an act of the testator outside the written instrument; here it arises on the terms of the instrument itself.]

In any event, the Plaintiff is entitled to the £200.

FRY, J., after stating the facts, continued:—

The Plaintiff now claims the legacy of £200. There is no doubt about the identity of the person, and the maxim *veritas demonstrationis tollit errorem nominis* would apply, and she is *primâ facie* entitled to the legacy, although she is described in

(1) Law Rep. 6 Ch. 136.
(2) 1 B. & B. 298.
(3) 2 Bro. C. C. 165.
(4) 5 My. & Cr. 145.
(5) 4th Ed. vol. ii. p. 397.

the will as the testator's wife, which she was not at the time of his death, and in law never had been. But it is said that the Court can see that the legacy was given to her with a particular purpose and intention, viz., to discharge the moral obligation which a man owes to his wife, and it is said that that particular purpose is declared by the testator's direction "that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my said estate." It is to be observed that the word is might, not may or shall. In my judgment that is not a declaration of any particular purpose for which the legacy is given, but it is only a direction that she shall take nothing besides the legacy. It does not really amount to an expression of a purpose or intent.

Then it is further urged that the effect of the instrument signed by the Plaintiff on the 10th of April, 1881, was to satisfy the purpose so declared by the will. But it appears to me that the purpose which a husband has in providing for a widow, and the purpose which a man, who has been declared not to be the husband of a woman by reason of impotence, has in making a provision for that woman during his lifetime are two entirely different and separable purposes. It is impossible to say that the one is a satisfaction or ademption of the other. Moreover, it must be observed that the cases in which the particular purpose of a legacy being satisfied during the lifetime of the testator has been held to prevent the legacy from taking effect are of a very restricted character. The rule applies only to cases in which the Court sees that the legacy is given for that which Lord Justice *James*, in *Pankhurst* v. *Howell* (1), described as a "particular specific purpose." He illustrates that in this way (2): "As for instance, a legacy given to purchase an advowson for a son, which would be adeemed, or perhaps it would be more correct to say satisfied, by the father afterwards purchasing the advowson for him." And the case of *Pankhurst* v. *Howell* itself shews within what narrow limits the Court has confined this principle of ademption. There the testator had given a sum of £200 to his wife, to be paid to her within ten days after his decease. There could be no doubt that the intention was to provide her with money immediately on her finding herself a

(1) Law Rep. 6 Ch. 136. (2) Law Rep. 6 Ch. 138.

FRY, J.
1883
In re BODDINGTON.
BODDINGTON *v.* CLARIAT.

widow. The testator had at her request during his last illness given her £200 that she might have a sum of money which she could control immediately on his death, without interference on the part of his executors, and it was held that the one gift did not satisfy the other. I think that principle of satisfaction does not apply here. I think that the principle which does apply is that which is stated by Lord *Cottenham* in *Rishton* v. *Cobb* (1). He said (2): "After looking through all the cases upon the subject, which are but few in number, I do not find that I can better define what circumstances will make the legacy void than by adopting the words of Lord *Alvanley* in *Kennell* v. *Abbott* (3), namely, that when a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy." In order that that rule may come into operation two things must exist; first, the false assumption of the character by the legatee; and secondly, there must be evidence, or a presumption or inference, that that false character was the motive of the testator's bounty. In the present case the first element is entirely wanting. There was no false assumption by this lady of the character of wife. The testator had gone through the ceremony of marriage with her. It was no act or default on her part which rendered the marriage invalid; the ground of the decree of invalidity was a default on his part, not on hers. There was not that fundamental fact on which such cases as *Kennell* v. *Abbott* proceeded. I hold, therefore, that the Plaintiff is entitled to the £200.

Then arises the question whether she is entitled to the annuity of £300, given to her "so long as she shall continue my widow and unmarried." It appears to me that the annuity is given to her for a period which can never come into existence. She never was the testator's widow, and therefore she can never continue his widow for any length of time. On principle, therefore, I am unable to see how an annuity for a non-existing period can possibly be claimed.

The only doubt in my mind has arisen from the case of *Rishton*

(1) 5 My. & Cr. 145. (2) 5 My. & Cr. 150.
(3) 4 Ves. 809.

v. *Cobb* (1), to which I have already referred. It appears to me, if I rightly follow (although I am not sure that I do) the reasoning of Lord *Cottenham*, that he proceeded very much on the ground of the appropriation of the £2000, and the direction to pay the dividends of that sum to the lady, and he came to the conclusion that that was an unlimited direction and consequently carried with it a gift of the whole fund. He appears to me to have intended to distinguish from that case such a case as the present, because he said (2): "This is different from a gift of dividends during widowhood." I repeat that I am not perfectly clear that I apprehend the principle on which Lord *Cottenham* there proceeded, and therefore I am under some apprehension that, in deciding this case as I do, my conclusion may be at variance with his view in that case. I think that on principle I must hold that the annuity to the Plaintiff does not arise, because it is given for a period which has no existence.

Then arises the question whether the Plaintiff can take in lieu and in substitution for the annuity the legacy of £2000. On principle it appears to me plain that she cannot. She can only take the legacy in lieu of the annuity; she can only take it in substitution of the annuity; she can only take it if she prefers it to the annuity—I am following the words of the testator. But all those expressions imply the existence of the annuity as a thing which she can take, and I hold that it is a thing which she cannot take. I think, therefore, that, if she cannot take the annuity, she can take nothing in lieu of it—nothing in substitution for it—nothing in preference to it. The gift of £2000 must therefore fail.

The Plaintiff succeeds in her demand to the extent of £200, and fails as to a much greater portion. I shall therefore give her no costs.

Solicitors for Plaintiff: *Ward, Mills, & Co.*
Solicitors for Defendants: *Sandilands, Humphry, & Armstrong.*

(1) 5 My. & Cr. 145. (2) 5 My. & Cr. 152.

W. L. C.

FRY, J.
1883
Jan. 27.

In re BIRT.
BIRT *v.* BURT.
[1876 B. 119.]

Executor—Retainer—Administration Action—Appointment of Receiver —Solicitor—Conflict of Interest and Duty.

In a creditor's administration action, brought against the administrator of an intestate (the Defendant being a solicitor, and a member of the firm of solicitors who were acting for the Plaintiff), after judgment for administration had been pronounced, an order was made on the application of the Plaintiff by his solicitors for the appointment of a specified person, "upon his giving security," to receive the rents of the intestate's real estate, and to collect and get in his outstanding personal estate. On the application for this order the Defendant made an affidavit stating his approval of the person proposed. Before the receiver had perfected his security some money arising from the sale of furniture belonging to the intestate was received by the Defendant's firm, and appropriated by him, and he claimed to retain out of it a debt due to him by the intestate:—

Held, that, by reason of the relation in which the Defendant stood to the Plaintiff as a member of the firm of solicitors who were acting for him, the Defendant stood in no better position than he would have stood after the receiver had perfected his security, and that the Defendant could not under the circumstances exercise his right of retainer.

Wickens v. *Townshend* (1) applied.

Adjourned summons.

This action was brought by a creditor for the administration of the estate of *Jacob Birt*, who died intestate on the 15th of February, 1876. Letters of administration to his estate were on the 15th of March, 1876, granted to the Defendant *H. W. Burt*, who was a solicitor, and a partner in the firm of *Webb, Stock, & Burt*, solicitors. This firm acted as the Plaintiff's solicitors in the action. On the 17th of March, 1876, the ordinary judgment for administration of the estate was pronounced. On the 21st of March, 1876, upon the application of the Plaintiff by his solicitors, an order was made in the action appointing *Frederick Lucas* "upon his giving security, to receive the rents of the intestate's real estate, and to collect and get in his outstanding personal estate." And it was ordered that the Defendant should deliver

(1) 1 Russ. & My. 361.

over to *Lucas* all securities in his hands for such outstanding personal estate, together with all books and papers relating thereto. On the application for this order an affidavit was made by *H. W. Burt*, in which he stated that he was administrator, and that he approved of the appointment of *Lucas* as receiver, believing him to be a proper person to be appointed. On the 3rd, 4th, and 5th of April, 1876, some furniture forming part of the estate of the intestate was, in pursuance of the order of the administrator previously given, sold by Messrs. *Tunley & Boyle*, auctioneers, for sums amounting in the whole to £1866 7*s.* 4*d.* On the 4th of April, 1876, the auctioneers sent to *Webb, Stock, & Burt* a cheque for £400, part of the proceeds of the sale, payable to their order. This cheque was indorsed by *Burt* in the name of his firm, and was paid by him to his own private banking account.

On the 7th and 8th of April respectively similar cheques for £1000 and £100, further parts of the proceeds of the sale, were respectively sent by the auctioneers to *Webb, Stock, & Burt*, and were respectively dealt with in the same way. The sums thus paid to *Burt's* private account amounted to £1500. On the 12th of April, *Lucas's* own recognizance and a joint and several bond of himself and a surety were executed as security for his faithful discharge of the duties of receiver. The security was approved by the Judge, and the bond and the recognizance were enrolled on the 29th of April. The Chief Clerk's certificate of the enrolment, dated the 4th of May, was filed on the 9th of May, 1876. On the 5th of May, 1876, an order was made giving the conduct of the proceedings in the action to *George Ell.* The balance of the proceeds of the sale of the furniture was afterwards paid by the auctioneers to *Lucas* as receiver. *H. W. Burt* claimed the right as administrator to retain out of the £1500 which he had received from the auctioneers a debt of £1409 17*s.* 10*d.* which was due to him by the intestate, and in the account which he carried in under the judgment he made the retainer accordingly. *Ell* took out a summons asking that the item of £1409 17*s.* 10*d.* might be disallowed in the Defendant's account as a proper payment by him out of the intestate's estate.

It was stated by counsel that the debt which the Defendant

FRY, J.
1883
In re BIRT.
BIRT *v.* BURT.

claimed to retain was due to him, not personally, but as a trustee on behalf of a third person, but of this there was no evidence.

Cookson, Q.C., and *Ingle Joyce*, for the summons:—

No doubt it has been held that, as against third parties, an order for the appointment of a receiver "upon his giving security" has no effect until the security is completed, as in *Edwards* v. *Edwards* (1); *Defries* v. *Creed* (2). But a party to the making of the order stands in an entirely different position; he cannot take advantage of the non-completion of the receiver's security. He stands in no better position than a stranger would have done after the receiver had completed his security. The appointment of the receiver, if his security had been completed, would have prevented the administrator from preferring any creditor: *In re Radcliffe* (3); or exercising any right of retainer, which is merely the right of an executor or administrator to prefer himself over the other creditors: *Talbot* v. *Frere* (4); *Walters* v. *Walters* (5); *Richmond* v. *White* (6).

At any rate the Defendant, being a member of the firm of solicitors who were acting for the Plaintiff in obtaining the order for the appointment of a receiver, could not defeat the rights of his own principal: *Wickens* v. *Townshend* (7). It was the duty of his firm as the Plaintiff's solicitors to procure the completion of the receiver's security, and any default or delay of theirs in so doing ought not to prejudice the Plaintiff or the other creditors to the advantage of the Defendant. It was the duty of his firm to prevent this money coming to his hands instead of the receiver's.

Glasse, Q.C., and *J. M. Lloyd*, for the Defendant:—

The objection is taken very late. At the time when the money was paid by the auctioneers the Defendant was the only person who could give a legal receipt for it, and when it reached his hands his legal right of retainer at once attached.

(1) 2 Ch. D. 291.
(2) 13 W. R. 632; 34 L. J. (Ch.) 607.
(3) 7 Ch. D. 733.
(4) 9 Ch. D. 568.
(5) 18 Ch. D. 182.
(6) 12 Ch. D. 361.
(7) 1 Russ. & My. 361.

[FRY, J.:—The Plaintiff's solicitors owed a duty to him. What right had they to allow the money to get into the hands of a man who had or might have a right of retainer, and who might then defeat the rights of their own principal? For aught I know they might, if they had been diligent, have got the receiver's security perfected sooner. The difficulty is that the Defendant's private interest was in conflict with his duty as the Plaintiff's solicitor.]

As a matter of fact he had no private interest; the debt in question was due to him in the character of trustee, and he had a duty to his *cestuis que trust*. But how can his concurrence in the appointment of a receiver deprive him of his legal right of retainer? He was legally entitled to receive the money, it was in his hands, and his *cestuis que trust* were entitled to insist on his exercising his right of retainer: *Sander* v. *Heathfield* (1). *Edwards* v. *Edwards* (2) is a clear authority that an order for the appointment of a receiver "on his giving security" has no effect till the security is given, and its authority was recognised in the later case of *Ex parte Evans* (3). There is no evidence of any delay in perfecting the receiver's security. The Defendant did not in fact act as the Plaintiff's solicitor; the business was transacted by his partner Mr. *Stock*. If the money had been paid to the account of the firm, it might have been lost in the event of their bankruptcy, and there was no order that it should be paid into Court. No one is bound by an order further than its express terms. An *interim* receiver might have been appointed without security as in *Truman* v. *Redgrave* (4), and then his appointment would have had immediate effect. Even if the order would have prevented a party to it from acquiring any right as against the receiver, it could not deprive him of any right which he already had.

FRY, J., after stating the facts and the order for the appointment of the receiver, continued:—

Upon the making of that order, as well as on the occasion of obtaining the administration judgment, the Plaintiff was repre-

(1) Law Rep. 19 Eq. 21.
(2) 2 Ch. D. 291.
(3) 13 Ch. D. 252.
(4) 18 Ch. D. 547.

FRY, J.
1883
In re BIRT.
BIRT *v.* BURT.

sented by the firm of *Webb, Stock, & Burt*, of which the Defendant was a member, and upon the occasion of the appointment of the receiver the Defendant made an affidavit in which he swore that Mr. *Lucas* was a fit and proper person to be appointed, and that affidavit was filed on behalf of the Plaintiff by the firm of *Webb, Stock, & Burt*. It appears to me that by so acting for the Plaintiff the Defendant undertook a duty towards him. But the Defendant was also a creditor of the intestate, and, being both creditor and administrator, he was interested in getting assets of the intestate into his hands so as to exercise against them his right of retainer. He had, therefore, assumed a duty inconsistent with that right, because, as representing the Plaintiff, it was his duty to use every diligence to prevent any such right of retainer being set up. The estate was either insolvent, or was likely to turn out insolvent, and the Plaintiff had an interest in the equal distribution of the assets, while the Defendant had an interest in their unequal distribution. By assuming the office of solicitor to the Plaintiff he, in my judgment, precluded himself from exercising any right which he otherwise would have had to an unequal distribution of the assets. That being his position, he directed a sale of the furniture. I am far from saying that he was not at liberty to do that, provided that he did nothing inconsistent with the Plaintiff's interest. Then, in the month of April, on three successive occasions, the firm of *Webb, Stock, & Burt* received cheques from the auctioneers for the furniture so sold for sums amounting in all to £1500. Those cheques were drawn in favour of the firm or order, and they found their way into the hands of the Defendant, who thereupon indorsed them in the name of his firm, and paid them to his own separate account. He thereby assumed possession of the assets against the interest of the Plaintiff, and against the title of the receiver upon his being appointed. The receiver gave his recognizance the day after the last of those cheques found its way into the banking account of the Defendant. It appears to me, therefore, that the Defendant, by undertaking a duty towards the Plaintiff as his solicitor, precluded himself from the right to receive the money, or, if he obtained it, from asserting a right of retainer against it. It is suggested that it was proper for him to retain it, because the firm of which he was a

member might have become bankrupt. If there was any danger of that kind, his duty was plain, viz., to have paid the money into Court, and so to have protected it, but I have no reason to suppose that the suggestion is not one drawn from fancy rather than probability. I think, therefore, that the Defendant having, as I have already said, undertaken the duty of solicitor to a person interested in the equal distribution of the assets; having been present at the appointment of the receiver; having sworn an affidavit approving of the receiver; and having as solicitor of the Plaintiff obtained the appointment of the receiver, was not at liberty to do anything but retain the moneys in question, and hand them over to the receiver when his recognizance was perfected. In coming to this conclusion it appears to me that I am acting in accordance with the principle on which Lord *Cottenham* acted in *Wickens* v. *Townshend* (1).

Solicitors for Applicant: *Ingle, Cooper, & Holmes.*
Solicitors for Defendant: *Webb, Stock, & Burt.*

W. L. C.

In re MASON.
MASON *v.* CATTLEY.

[1881 M. 3538.]

Production of Documents—Privilege—Trustee and Cestui que Trust—Correspondence with Solicitors ante litem motam.

In an action by *cestuis que trust* against their trustees to compel them to make good a breach of trust:—

Held, that the trustees must produce letters and copies of letters from and to their solicitors in relation to matters in question in the action *ante litem motam*.

Talbot v. *Marshfield* (2) followed.

ADJOURNED SUMMONS.

This action was brought by some of the beneficiaries under the will of *J. J. Mason*, who died on the 18th of October, 1875, against one of the trustees of the will and the executors of the

(1) 1 Russ. & My. 361. (2) 2 Dr. & Sm. 549.

FRY, J.
1883
In re MASON.
MASON *v.* CATTLEY.

other trustee (who was dead), alleging that the trustees had committed a breach of trust, and claiming that the surviving trustee, and the estate of the deceased trustee, might be declared jointly and severally liable to make good all loss arising from the breach of trust, and that, if the executors of the deceased trustee did not admit assets of their testator sufficient to satisfy the liability, his estate might be administered under the decree of the Court.

The surviving trustee was required to make an affidavit of documents in his possession. By his affidavit he objected to produce (*inter alia*) some letters and copies of letters which had passed between him and his co-trustee and their solicitors, in relation to matters in question in the action before the commencement of the litigation.

The Plaintiffs took out a summons for the production of these documents.

Medd, for the summons:—

The principle of *Talbot* v. *Marshfield* (1) applies.

Micklem, for the Defendant, referred to *Brown* v. *Oakshott* (2).

FRY, J.:—

I think the documents in question must be produced. It is admitted that they are relevant to the matters in issue in the action. They are communications by and to the trustees and their solicitors in relation to the trust estate, made before the action was brought. It appears to me that *Talbot* v. *Marshfield* applies. The Respondent must pay the costs of the application.

Solicitors: *Hughes & Son; Crowder, Anstie, & Co.*

(1) 2 Dr. & Sm. 549. (2) 12 Beav. 252.

W. L. C.

NICHOLS *v.* EVENS.

FRY, J.

1883

Jan. 27.

[1882 N. 498.]

Payment into Court by Defendant in satisfaction—Acceptance—Costs of Plaintiff—Discretion of Court—Rules of Court, 1875, *Order* XXX. *rr.* 1, 4—*Order* LV. *r.* 1.

Order XXX. applies only to an action which is strictly brought to recover a debt or damages.

If an account is claimed the order does not apply, and, even if the Plaintiff accepts in satisfaction of his whole cause of action a sum paid into Court by the Defendant, the Court has a discretion as to the costs.

ADJOURNED SUMMONS.

The Plaintiff brought this action on behalf of herself and all other the holders of bonds of the *New Wernpistill Colliery Company*, secured by an indenture dated the 11th of January, 1876, against the trustees of that deed and the company, claiming to have the trusts of the deed carried into execution under the direction of the Court, and that for that purpose all necessary accounts might be taken, inquiries made, and directions given.

The Plaintiff by her statement of claim, delivered the 22nd of May, 1882, alleged that the trustees had received £1500 by the sale of some property of the company (which was in voluntary liquidation); that the trustees in breach of their duty had paid to or allowed the company or its liquidator to retain a sum of £200 out of the purchase-money of £1500; and that the trustees had allowed other assets of the company, which were subject to the trusts of the deed of the 11th of January, 1876, and were charged with the payment of the company's bonds, and of which, but for their wilful default, the trustees might have obtained possession, to be retained by the company and their liquidator, and that the same had been thereby lost to the bondholders.

The Plaintiff also claimed that in taking the accounts the trustees might be charged with such moneys as they might but for their wilful default have received, and might be disallowed the said sum of £200, or other the sum or sums paid by them out of the £1500 in the liquidation of the company. No relief was claimed against the company.

FRY, J.
1883
NICHOLS
v.
EVENS.

The trustees, by their statement of defence, delivered the 10th of June, 1882, denied the charges brought against them by the Plaintiff. And as to the sum of £200, they said that it was voted towards the expenses of the winding-up of the company out of the purchase-money of £1500 by a resolution of a general meeting of the company's bondholders, and was rightly paid to the company's liquidator. And they said that, having regard to the number of bonds held by the Plaintiff, the injury which she alleged she had suffered in respect of the £200 was less than £2 12*s.* 6*d.* The trustees further said that they were willing to pay the Plaintiff the dividend which she was entitled to receive in respect of her bonds, which, they said, amounted to only £23 16*s.* 8*d.*, and they said that they had brought that sum, and also a sum of £2 12*s.* 6*d.*, to cover the Plaintiff's claim in respect of the £200, into Court, and that these sums were sufficient to satisfy the Plaintiff's claim. This was the first notice which the trustees had given to the Plaintiff of the payment into Court.

On the 23rd of November, 1882, the Plaintiff not having delivered a reply, her solicitors gave notice in writing to the Defendants' solicitor that the Plaintiff accepted the two sums paid into Court "in satisfaction of her entire cause of action."

On the 29th of November the Defendants took out a summons, asking that all further proceedings in the action might be stayed, and that the Plaintiff might be ordered to pay to the Defendants respectively their costs of the action.

E. Beaumont, for the Defendants:—

Under the circumstances of this case rule 4 of Order xxx. (1) does not apply, and the Court has a discretion under Order lv. rule 1, as to the costs which the Plaintiff should pay. This is not

(1) Order xxx. rule 1: "Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a Judge at any later time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein."

Rule 4: "The plaintiff, if payment into Court is made before delivering a defence, may within four days after receipt of notice of such payment, or if such payment is first stated in a

an action simply to recover a debt or damages: *Buckton* v. *Higgs* (1); *Greaves* v. *Fleming* (2). The Plaintiff has accepted the money in satisfaction of her whole cause of action, and she ought to pay all the costs subsequent to the delivery of the defence. We ought not even to pay all the costs down to that date.

A. A. Terrell, for the Plaintiff:—

Rule 4 of Order xxx. applies.

E. Beaumont, in reply.

FRY, J.:—

There are two questions to be decided: 1. whether the Court has a discretion about the costs of the action, or whether the costs are regulated by rule 4 of Order xxx.; 2. if that rule does not apply, how ought I to exercise my discretion? [His Lordship stated the facts, and continued:—] In their statement of defence the Defendants say that the money is paid into Court to cover the Plaintiff's particular demands in respect of her share of the capital money and in respect of her share of the £200. They do not say that they have paid it into Court in satisfaction of her entire demand, nor could they do so, for the Plaintiff was asking an account on the footing of wilful default, and it was not possible to satisfy this demand by any specific payment. I am of opinion that Order xxx. does not apply to this case. In my judgment that order applies, as is shewn by rule 1, only to a case in which the Plaintiff is strictly seeking to recover a debt or damages, where the whole demand applies to money. If the Plaintiff seeks an account it is impossible to satisfy that demand by any specific payment of money. I think, therefore, that the Court has in the present case a discretion as to the costs.

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defence delivered, then may before reply accept the same in satisfaction of the causes of action in respect of which it is paid in, in which case he shall give notice to the defendant, in the form No. 6 in Appendix (B.) hereto, and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and, in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed."

(1) 4 Ex. D. 174.

(2) 4 Q. B. D. 226.

FRY, J.
1883
NICHOLS
v.
EVENS.

Then the question is, how ought I to exercise this discretion? I think the Plaintiff ought to have her costs down to the 10th of June, and that the Defendants ought to have their costs since that date. The Plaintiff has accepted the money paid into Court in satisfaction of all her demands. She herself has stopped the action by taking the money in satisfaction of more than that for which the Defendants paid it in. I see no reason why she should not have accepted it in June. But I shall give no costs of this application, because the Defendants asked too much.

Solicitor for Defendants: *Felix Carter.*
Solicitors for Plaintiff: *Terrell & Harrison.*

W. L. C.

FRY, J.
1883
Feb. 8.

SANDS TO THOMPSON.

[1882 S. 5221.]

Mortgage — Satisfaction — Legal Estate — Tenancy at Will — Express Trust — 3 & 4 Will. 4, c. 27, ss. 7, 25, 34 [Revised Ed. Statutes, vol. vii. pp. 389, 393, 395] — 37 & 38 Vict. c. 57, s. 1.

When the money due upon a mortgage has been paid to the mortgagee, but no reconveyance has been executed, the mortgagor becomes from the date of such payment a tenant at will to the mortgagee, and the legal estate of the mortgagee is extinguished by thirteen years adverse possession of the mortgagor.

The 25th section of the *Statute of Limitations* (3 & 4 Will. 4, c. 27) relates to express trusts only, and does not apply to the relation between a mortgagee whose mortgage has been satisfied and the mortgagor.

BY an indenture of mortgage dated the 22nd of April, 1853, certain hereditaments in the county of *Devon* were conveyed to Sir *Thomas Ackland* and others to secure £17,000 and interest.

In the year 1856 the mortgage was paid off, but no reconveyance was made.

The hereditaments were agreed to be sold by the successor in title of the mortgagor on the 12th of April, 1882, and the purchaser took the objection that the legal estate was outstanding in the mortgagee by virtue of the deed of 1853.

This was a summons taken out by the purchaser under the *Vendor and Purchaser Act*, 1874, asking that it might be declared that a good title had not been made to the hereditaments.

The vendor insisted that the title was good, the legal estate being now vested in him by virtue of the *Statute of Limitations*, or that in any event a reconveyance ought to be presumed after such a lapse of time.

Cookson, Q.C., and *Whately*, for the purchaser:—

The *Statutes of Limitation* do not help the mortgagor. The right of the mortgagor is to bring an action to recover the land from the mortgagee, who is a trustee for him: *Drummond* v. *Sant* (1); *Petre* v. *Petre* (2). Those statutes only bar the mortgagee as to any claim in respect of the mortgage money, and that is not enough *per se* to revest the legal estate in the mortgagor. On the payment of the money the mortgagee ceased to be mortgagee, and became a trustee for the mortgagor: *Garrard* v. *Tuck* (3). The *Statute of Limitations* does not affect trusts. The time which has elapsed is not sufficient to enable the Court to presume a reconveyance.

Wolstenholme, for the vendor:—

The mortgagee never became a trustee for the mortgagor: *In re Carpenter* (4), in which the effect of *In re Propert* (5) is not correctly stated.

[FRY, J., referred to *In re Cuming* (6).]

Petre v. *Petre*. 3 & 4 Will. 4, c. 27, s. 25, applies only to trusts expressly declared by a written instrument. Therefore the legal estate remaining in the mortgagee became extinguished by virtue of the *Statutes of Limitation*, thirteen years after the money was paid by the mortgagor, who thereupon became tenant at will to the mortgagee. After the lapse of time a conveyance will be presumed: *Hillary* v. *Waller* (7).

(1) Law Rep. 6 Q. B. 763.
(2) 1 Drew. 371.
(3) 8 C. B. 231.
(4) Kay, 418.
(5) 22 L. J. (Ch.) 948; 1 W. R. 237.
(6) Law Rep. 5 Ch. 72.
(7) 12 Ves. 239, 250.

FRY, J.
1883
SANDS TO THOMPSON.

Cookson, in reply:—

The legal estate remained in the mortgagee after the payment of the money upon an express trust—every trust which does not require the assistance of the Court of Chancery to raise it, is an express trust. The right to have a reconveyance from the mortgagee is subject to qualification: *Teevan* v. *Smith* (1). The mortgagor did not become a tenant at will to the mortgagee in such a sense that the 34th section of the *Statute of Limitations* applies, for any entry by the mortgagee would have been wrongful, the payment being a full satisfaction: 7 Geo. 2, c. 20.

[FRY, J., referred to *Doe* v. *Rock* (2); *Drummond* v. *Sant* (3).]

FRY, J.:—

The question which I have now to determine arises upon a very short statement of facts. It appears that the vendor in the present case, or his predecessor in title, in April, 1853, made a mortgage of the property to Sir *Thomas Ackland* and others, and that in the year 1856 that mortgage was paid off, but no reconveyance was executed. It appears to me that upon that payment being made the mortgagee clearly became a trustee for the mortgagor, and the mortgagor became tenant at will to the mortgagee of the legal estate of the property comprised in the mortgage. It is not necessary to go into the difficult inquiry of what is the exact relation between mortgagor in possession and mortgagee, whilst the relation of mortgagor and mortgagee is subsisting. That we know has sometimes been described as the relation of tenant at will; sometimes it is said to be purely anomalous and *sui generis*. It appears to me that after the payment was made, and the true relation of mortgagor and mortgagee had come to an end, the mortgagor was tenant at will to the mortgagee, who had the legal estate.

That being the conclusion at which I arrive, it remains to inquire how far the 34th section of the 3 & 4 Will. 4, c. 27, applies. That provides "That at the determination of the period limited by this Act to any person for making an entry or distress, or

(1) 20 Ch. D. 724.
(2) Car. & M. 549; 4 Man. & G. 30.
(3) Law Rep. 6 Q. B. 763.

bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished." Before we can determine the end of the period we must settle the beginning of the period, and therefore the inquiry is, at what time did the right of the mortgagee to enter begin? It has been contended before me that the 25th section of the same Act which provides for the relation of trustee and *cestui que trust* in the case of an express trust applies, and that that has taken it entirely out of the operation of the 34th section. In my view that is not so at all. It is not shewn that in the present case there was any trust comprised in the mortgage. I understand that it was in the ordinary form containing the usual condition, and that therefore the mortgagee's estate had become absolute at law, and that the instrument contained no words raising a trust in the event which happened. My notion of an express trust is that it is a trust which has been expressed, either in writing or by word of mouth, and that it does not include a trust which arises from the acts of the parties. The term does not apply, in my judgment, to a resulting trust, to an implied trust, or to a constructive trust. The judgment of Vice-Chancellor *Kindersley* in *Petre* v. *Petre* (1) is an exact expression of that view, with this single exception, that he inclined to confine it to trusts which are expressed in writing. It is not necessary for me to consider how far that limitation was accurate. I hold, therefore, that the 25th section does not apply.

In order then to answer the inquiry at what time the right of the mortgagee to enter accrued (he, as I hold, being the lessor at will) it is necessary to refer to the 7th section of the same Act which deals with tenancies at will. That provides "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one

(1) 1 Drew. 371.

FRY, J.
1883
SANDS
TO
THOMPSON.

year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." Now, pausing there, it is plain that the original Act gave a period of twenty-one years from the beginning of the tenancy as the longest period during which the lessor at will could enter upon the lessee at will. That period would now be reduced to thirteen years. Then there followed the proviso "that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

It appears to me that the case which I am considering is not within the proviso, because the mortgage had come to an end by the payment off. The true relation of mortgagor and mortgagee was no longer subsisting between the parties. It appears to me equally, having regard to the two decisions of *Doe* v. *Rock* (1) and *Drummond* v. *Sant* (2), that the mortgagee was not a trustee, and the mortgagor was not a *cestui que trust* within the meaning of that proviso, the Courts having put upon the word "trustee" in that clause the meaning of a trustee under an actual express trust. It follows that in my judgment the 7th section applies, and that the lessor at will, that is to say the mortgagee, had thirteen years after the commencement of the tenancy at will within which to bring his action—that at the end of that thirteen years his right was extinguished by the 34th section. More than the thirteen years having expired the legal estate has been extinguished, and the fact that there was no reconveyance ceases to be any objection.

It has been urged before me that the 34th section of the Act cannot apply at all to a case in which in the view of the Court of Equity an entry would be entirely wrongful. I cannot entertain that view. The right at law of a mortgagee who has not reconveyed to his mortgagor to enter upon the mortgaged property appears to me to be plain. It is not taken away by the statute of Geo. 2, to which reference has been made. In the first place that does not take away the right of action, it only stays the action upon certain terms. In the second place it appears to me that that statute does not apply at all to this particular case. It provides for a case in which money is still due

(1) Car. & M. 549; 4 Man. & G. 30. (2) Law Rep. 6 Q. B. 763.

upon the mortgage, and in which therefore the Court of Equity could not grant relief until the account had been taken. This state of circumstances does not arise, where the mortgage has been paid off before the action is brought. I therefore overrule the objection which has been urged before me.

Solicitors for Purchaser: *Soames & Thompson.*
Solicitors for Vendor: *Field, Roscoe, & Co.*

C. W. C.

BULLMORE *v.* WYNTER.

[1882 B. 6688.]

Will—Construction—"Husband"—Divorce.

A testator devised property to his daughter for life, and after her death in trust for "any husband with whom she might intermarry, if he should survive her, for his life."

The daughter married the Defendant, and was divorced from him on his petition, and he married again and survived her:—

Held, that the Defendant was entitled to the property devised for his life.

HENRY BULLMORE, by his will dated in 1865, devised his residue to trustees upon trust to sell and convert the same, and to hold the trust moneys upon trust to pay the income to his daughter *Beatrice* during her life for her separate use, independent of any husband, restrained from anticipation; and after the death of his said daughter, in trust for any husband with whom she might intermarry, if he should survive her, for his life.

Beatrice Bullmore married *H. Barber* in 1867, who died in 1870, and in 1872 she married the Defendant *W. R. Wynter*.

On the 4th of June, 1878, on the petition of *W. R. Wynter*, a decree for the dissolution of his marriage with the testator's daughter was made absolute.

The Defendant, *W. R. Wynter*, married again in the lifetime of his late wife.

On the death of the testator's daughter on the 24th of August, 1882, the Defendant, *W. R. Wynter*, claimed the life interest

FRY, J.
1883
BULLMORE
v.
WYNTER.

given by the testator's will to his daughter's husband after her decease for life.

Warmington, Q.C., and *Rawlins*, for the Plaintiff, the trustee of the will:—

The Defendant was not husband of the testator's daughter when he survived her. In order that he should be entitled to take under the words of the devise it was necessary that he should be his wife's husband at the time of her death.

[They referred to *Boddington* v. *Clariat* (1) decided by *Fry*, J., on the 23rd January.]

Cookson, Q.C., and *Bagshawe*, for the Defendant, *W. R. Wynter*:—

The same consequences as to property must follow divorce as would have followed the death of the wife: *Wilkinson* v. *Gibson* (2); *Fitzgerald* v. *Chapman* (3); *Burton* v. *Sturgeon* (4).

FRY, J., stated the facts, and said:—

The question before me is a small but a curious one; it is whether the Defendant is entitled to a life interest in the residuary estate of the testator as the surviving husband of the testator's daughter. It is necessary to look at the very words of the bequest—they are "in trust for any husband with whom she might intermarry, if he should survive her." The Defendant was a husband with whom the testator's daughter intermarried, and he survived her, so that he fulfils all the words of the bequest. It is contended that he must survive her as her husband, *i.e.*, that he must be her husband at the date of her death in order to take—but I find no such words nor any expression of such an intention in the will. No doubt the testator when he made his will did not contemplate the events which have happened. There is nothing expressed in the will to exclude the Defendant. He was a husband with whom the daughter of the testator intermarried, and he survived her.

A difficulty which might arise from this view has certainly occurred to me. It is obvious that the same wife might have

(1) *Ante*, p. 597.
(2) Law Rep. 4 Eq. 162.
(3) 1 Ch. D. 563.
(4) 2 Ch. D. 318.

married a husband, or husbands, from whom she might have been divorced, and who might survive her, and that a husband might also survive her from whom she had not been divorced, in which case there would then be more than one surviving husband each of whom would satisfy the words in the will.

But it does not seem to be right to give so much weight to the possibility of such a contingency as to overrule what appears, in my opinion, to be the plain meaning of the will. I therefore declare that the Defendant is entitled to the property he claims for his life.

Solicitor for Plaintiff: *F. Cotton.*
Solicitors for Defendant: *Palmer, Eland, & Nettleship.*

C. W. C.

CHITTY, J.

1882

Dec. 18.

In re FREER.

FREER *v.* FREER.

[1881 F. 415.]

Lunatic Testator—Lunacy Jurisdiction—Specific Bequest—Order for Sale—Separate Account—Ademption—Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), *ss.* 118, 119 [*Revised Ed. Statutes, vol. xi. p.* 685].

A testator made a specific bequest of stock in the *G.* railway company. After the date of his will he was found a lunatic. Under an order in the lunacy, the stock was sold and the proceeds were invested in a sum of consols, which was carried to the credit of the lunatic to an account intituled "Proceeds of the sale of stock in the *G.* railway company."

In an action for the administration of the testator's estate:—

Held, that the specific legacy was adeemed by the sale in the lunacy, and that the consols therefore fell into the residue.

Observations on *Jones* v. *Green* (1), and *In re Leeming* (2).

FURTHER CONSIDERATION.

Richard Freer, by his will dated the 12th of August, 1878, bequeathed "all his first preference bonds in the *Grand Trunk of Canada Railway Company*" (except six bonds of £100 each), to his son the Defendant, *John Henry Freer*, for life, with remainder to his children. And he devised and bequeathed the residue of his real and personal estate, as to two equal fifths to his son, the Plaintiff, absolutely; as to two other fifths, to the Defendant, *J. H. Freer;* and as to the remaining fifth to his (the testator's) daughter, the Defendant, Mrs. *Caroline Ann Landor*.

The testator died on the 20th of January, 1881.

Subsequently to the date of his will the testator became of unsound mind; on the 4th of June, 1879, he was duly found a lunatic by inquisition, and in January, 1880, the Plaintiff was appointed committee of his estate.

At the date of his will the testator was possessed of £2830 first preference stock in the *Grand Trunk Railway Company of Canada*, this stock being made up of £2400 formerly called first preference bonds and £430 capitalised interest thereon.

Under an order of the Lords Justices made in the lunacy this

(1) Law Rep. 5 Eq. 555.

(2) 3 D. F. & J. 43; 7 Jur. N.S. 115

stock was sold, on the ground that it was an unsafe investment, and the proceeds were on the 4th of January, 1881, paid into Court to the credit of the lunatic, to an account intituled, "Proceeds of the sale of stock of the *Grand Trunk Railway Company of Canada*," and invested in consols, the consols being carried to the same credit and account.

In March, 1881, this action was instituted for the administration of the testator's estate, and in June following the Lords Justices made an order in the lunacy directing the fund to be carried over to the credit of the action to an account intituled as in the lunacy.

The question was whether by reason of the sale in lunacy the specific legacy of the *Grand Trunk* stock had been adeemed.

Ince, Q.C., and *Byrne*, for the Plaintiff, a residuary legatee:—

We submit that the legacy of the bonds or stock was adeemed by the sale in lunacy. In *Oxenden* v. *Lord Compton* (1) it was held that the proceeds of real estate belonging to a deceased lunatic and sold under an order in Lunacy passed on his death as personal estate, there being no equity as between the real and personal representatives of the lunatic to convert the property from the condition in which it was found at the death. That state of the law was, however, altered by the *Lunacy Regulation Act*, 1853 (16 & 17 Vict. c. 70), which enacted (s. 119), that the proceeds of a lunatic's real estate sold under an order in Lunacy should preserve its character of real estate (2). But that section related

(1) 2 Ves. 69.

(2) Sect. 119 of the *Lunacy Regulation Act*, 1853, is as follows:—"On any moneys being raised by sale, mortgage, charge, or other disposition of land made in pursuance of any of the foregoing provisions, the person whose estate is sold, mortgaged, charged or otherwise disposed of, and his heirs, next of kin, devisees, legatees, executors, administrators and assigns, shall have such and the like interest in the surplus moneys remaining after the purposes for which the moneys have been raised shall have been answered, as he or they would have had in the estate if no sale, mortgage, charge, or other disposition thereof had been made, and the surplus moneys shall be of the same nature and character as the estate sold, mortgaged, charged, or otherwise disposed of; and the Lord Chancellor intrusted as aforesaid may make such orders, and direct such conveyances, deeds, and things to be executed and done (which may and shall accordingly be executed and done), as may be necessary for the effectuating this present provision, and for the due application of the surplus moneys."

CHITTY, J. 1882 *In re* FREER. FREER *v.* FREER.

only to real estate, leaving the question of personal estate to be dealt with by the general law.

In *Browne* v. *Groombridge* (1) it was laid down that, as between legatees, personal property duly converted must be taken in the state and character in which it is found at the death of the testator. *Jones* v. *Green* (2) exactly covers this case. There, a testator bequeathed the income of certain shares specifically, and bequeathed the shares to his residuary legatees. After the date of his will he was found a lunatic, and under an order in the lunacy the shares were sold and the proceeds invested in consols. It was held that the gift of income was adeemed by the sale and that the consols fell into the residue. The fact of the proceeds of the stock in the present case having been ear-marked by being carried to a separate account does not make the slightest alteration in any person's rights or expectations; and the money must be dealt with without reference to the account to which it has been carried, and as if there had been no such carrying over at all: *In re Barker* (3). The conversion having been rightfully made, all the consequences of a conversion must follow, there being no equity for a reconversion: *Foster* v. *Foster* (4).

Romer, Q.C., and *Langworthy*, for the Defendant *J. H. Freer*, the specific legatee:—

The sale of the stock ought not to be allowed to defeat the testator's obvious intention as expressed by his will: *Ex parte Haycock* (5); and we therefore submit that the proceeds of the sale should for all purposes represent the property sold. The doctrine of ademption does not apply to a case where, after a testator has given a specific thing, and without his knowledge, perhaps against his wishes, another person has sold it or altered its character: *Jenkins* v. *Jones* (6); or where the nature of the legacy has been changed by mere act or operation of law: *Roper* on Legacies (7). In *Partridge* v. *Partridge* (8) the Lord Chancellor said: "All cases of ademption of legacies arise from a

(1) 4 Madd. 495.
(2) Law Rep. 5 Eq. 555.
(3) 17 Ch. D. 241.
(4) 1 Ch. D. 588.
(5) 5 Russ. 154.
(6) Law Rep. 2 Eq. 323.
(7) 3rd Ed. vol. i. p. 289.
(8) Cas. t. Tal. 226.

supposed alteration of the intention of the testator." Here the testator had nothing to do with the sale of the stock, the sale being made entirely without his knowledge. It would surely be inequitable to hold that his expressed intentions should be defeated by circumstances over which he neither had nor could have any control whatever. Moreover, the order to carry the proceeds to a separate account shews that it was not intended by the Court that the sale should alter the rights of the parties as fixed by the testator himself. It was equivalent to a direction that, although the stock must be sold, the proceeds should represent it for all purposes. That the Lord Chancellor in Lunacy has power to make such a direction in an order for sale, so that the proceeds may be ear-marked for the benefit of those persons who would have been entitled to the property had it remained unconverted, is clear from Lord Justice *Giffard's* observations in *Jones* v. *Green* (1), where he says (2), "There might, no doubt, have been a direction accompanying the order, that the proceeds of the shares were to belong to the same persons as were the owners of the original shares." In proceedings in Lunacy relating to the estate of a deceased lunatic, care is always taken not to alter the rights of the persons interested in the estate.

In *In re Leeming* (3) the Lords Justices refused to accept the view that at the death of a lunatic his real and personal representatives must, *inter se*, take the property as they found it.

Ince, in reply:—

In re Leeming does not affect this case. It is very shortly reported; but it is probably to be explained by reference to sect. 118 of the *Lunacy Regulation Act*, 1853, which empowers the Lord Chancellor in Lunacy to order that money expended under his order for the permanent advantage of the land of the lunatic shall be a charge on the lunatic's interest in the land.

Macnaghten, Q.C., and *C. W. Greenwood*, for the Defendants Mrs. *Landor* (a residuary legatee) and her husband.

(1) Law Rep. 5 Eq. 555. (2) Law Rep. 5 Eq. 560.
(3) 3 D. F. & J. 43.

CHITTY, J. CHITTY, J.:—

1882

In re FREER. FREER *v.* FREER.

In this case the testator has bequeathed all his first preference bonds in the *Grand Trunk of Canada Railway Company* (except six bonds of £100 each) to his son for life, with remainder to his children. The facts of the case are, that at the date of his will the testator held £2830 first preference stock of this same railway company. Subsequently to the date of his will he was found a lunatic, and, in exercise of the jurisdiction of the Lord Chancellor, intrusted with the administration of lunatics' estates, the stock—the investment not being considered a safe one—was directed to be sold, and the proceeds were ordered to be ear-marked by being carried to the credit of the lunatic, to an account intituled "Proceeds of the sale of stock of the *Grand Trunk Railway Company of Canada.*" Under these circumstances the question arises whether the legacy itself has not been adeemed. I use the word "adeemed" as being the common term, though a distinction is made by the text-writers between "ademption" and "extinction." But here no distinction need be made between these two terms, because the contention of the residuary legatee is that the legacy itself now no longer exists.

Then arises the further question whether anything was done in the lunacy to prevent the proceeds of the stock from passing in the same way as the stock itself.

The nature of the jurisdiction in Lunacy is well explained in *Oxenden* v. *Lord Compton* (1): it is only a power of administration; and even if the Court had, in the present case, directed that the proceeds of the stock should for all purposes represent the stock, I am not prepared to say that such a direction would have had any effect in altering the rights of the parties. However, the effect of the order as it stands is to leave the question open.

It is said that Lord Justice *Giffard*, when Vice-Chancellor, in *Jones* v. *Green* (2) made some observations which shew that the Lord Chancellor intrusted in lunacy can give a direction in the order for sale that the proceeds of the property converted shall belong to the persons who would have been the owners of the property if it had remained unconverted. There is, no doubt, a

(1) 2 Ves. 69. (2) Law Rep. 5 Eq. 555.

statement to that effect in the judgment, but no authority has been produced to me which justifies that *dictum;* and, moreover, against that *dictum* I must cite the *dictum* of Lord Justice *Cotton* in *In re Barker* (1), where he says (2), "With regard to the payment into Court in the lunacy, without carrying it to a real estate account, that, in my opinion, ought not to alter the rights of the parties. The money must be dealt with without reference to the account to which it has been carried, and as if there had been no such carrying over at all. Indeed, the carrying it to a real estate account would not alter the rights at all, but simply call the attention of the Court, when the money is paid out, to the fact that a question arises about it, and that, instead of being, as apparently it is, cash, it is to be considered whether it does not still preserve the character of real estate." That is the opinion at which I have arrived upon the order before me, and, with great respect to Lord Justice *Giffard,* I think Lord Justice *Cotton's dictum* is to be preferred.

The general law upon the subject is clear. If the testator himself not being a lunatic, had sold the stock and placed the proceeds to a separate account in his books, with a memorandum that for all purposes the proceeds were to stand in the place of the stock, the *Wills Act* would have stood in the way, and the memorandum would not have affected the rights of parties *inter se:* and to my mind, all that has been done in the present case under the lunacy jurisdiction amounts to nothing more than what I have stated; for the law places the estate of the lunatic in the same position as if there had been no lunacy, except for the 119th section of the *Lunacy Regulation Act,* 1853, which provides that the proceeds of land shall, notwithstanding its conversion, preserve the character of land, and belong to the same persons who would have been entitled to the land if there had been no conversion. [His Lordship read the section.] Why was that provision made?

There were found to be defects in the lunacy jurisdiction, and therefore it was intended by the Legislature, by means of the *Lunacy Regulation Act,* 1853, to give the persons intrusted with lunatics a greater power than they formerly possessed. Accordingly sect. 118 empowered the Lord Chancellor intrusted with the

(1) 17 Ch. D. 241. (2) 17 Ch. D. 245.

CHITTY, J.
1882
In re FREER.
FREER v. FREER.

administration of lunatics' estates, to order that moneys directed to be expended in improving the lunatic's land should be a charge on his interest in such land; and then sect. 119 went on to provide, in the terms I have read, for the destination of the proceeds of any land sold or otherwise disposed of in the lunacy. The decision in *In re Leeming* (1), so far as it requires explanation, may be explained by reference to the 118th section: but the case really explains itself. The order made in that case was that the amount due on a mortgage of real estate created by the lunatic's ancestor, should be paid out of the fund in Court standing to the credit of the lunacy, this fund having arisen from the lunatic's personal estate: but the order was made without prejudice to the question how the mortgage debt ought ultimately to be borne. The order also directed the mortgage to be kept on foot. Upon the question reserved coming before the Court for decision, it was held that the mortgage being an incumbrance on the real estate, the mortgage debt ought to be raised out of the real estate.

That case is no authority for the proposition contended for in this case by the specific legatee, and I therefore hold that there was an ademption of the stock sold in the lunacy. I accordingly give judgment in favour of the Plaintiff. I regret the result, but I consider the case to be plain.

Solicitors: *Paterson, Snow, & Bloxam*, agents for *R. Armishaw, Rugeley; J. J. & C. J. Allen.*

(1) 3 D. F. & J. 43.

G. I. F. C.

BIRCH *v.* MATHER.

CHITTY, J.

1883

Jan. 12.

[1882 B. 484.]

Practice—Patent Action—Interrogatories—Further Particulars—Patent Law Amendment Act, 1852 (15 & 16 *Vict. c.* 83), *s.* 41 [*Revised Ed. Statutes, vol. xi., p.* 485]—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125) [*Revised Ed. Statutes, vol. xii. p.* 409].

In a patent action where the plaintiff or defendant, as the case may be, makes out a proper case the Court has jurisdiction to order interrogatories to be answered notwithstanding the provision in the *Patent Law Amendment Act*, 1852, for the delivery of particulars.

The plaintiff is also entitled under the 41st section of the same Act to the names and addresses of the persons by whom prior user is alleged to have been made as well as the places where the prior user has taken place.

IN this action the Plaintiff sought the usual relief against the Defendants in respect of alleged infringements of certain letters patent.

The action was laid in the *Manchester* district registry. The statement of claim was delivered on the 4th of April, 1882, the statement of defence on the 10th of June, 1882, with the latter were delivered particulars of objections, including a statement that the Plaintiff's alleged invention had been used "prior to the date of the letters patent" at certain works; naming them. On the 24th of November, 1882, the pleadings being closed, the Plaintiff applied to the district registrar for leave to administer interrogatories asking for the names and addresses of the persons who were alleged to have used the invention at the places referred to in the particulars, and also whether the machines were in existence. The registrar gave leave. The Defendants appealed, and for that purpose issued an appeal summons on the 25th of November, 1882.

Clement Higgins, for the Defendants:—

In a patent action the Court has no jurisdiction to order an answer to interrogatories directed to matters specified in the particulars of objections. The application should be for further particulars.

CHITTY, J. 1883 BIRCH v. MATHER.

The Plaintiff is only entitled to discovery as to the places where the prior user has occurred, and is not entitled to the names and addresses of the persons who have used the invention: *Flower* v. *Lloyd* (1). *Bovill* v. *Smith* (2), *Daw* v. *Eley* (3), and *Benbow* v. *Low* (4), were also referred to.

Chadwyck Healey, for the Plaintiff:—

Under the *Patent Law Amendment Act*, 1852, the Court can only order particulars in the forms prescribed by that Act. The *Common Law Procedure Act*, 1854, which conferred the right of interrogating parties at law was passed subsequently to the *Patent Law Amendment Act*, and that Act and the *Judicature Act* do not except patent actions from the provisions as to discovery.

The names and addresses of the persons by whom the invention has been used, as well as the places at which the prior user took place must be given: *Flower* v. *Lloyd* (5).

[He also referred to *Saunders* v. *Jones* (6), *Finnegan* v. *James* (7), *Crossley* v. *Tomey* (8), and *Eade* v. *Jacobs* (9).]

Clement Higgins, in reply.

CHITTY, J.:—

This is an appeal from the *Manchester* district registrar, who has made an order giving leave to the Plaintiff to deliver two interrogatories for the examination of the Defendants. The interrogatories in substance relate to the matters which are stated in the Defendants' particulars of objections, and the interrogatories seek to discover from the Defendants, the names and present addresses of persons who are alleged to have used—that is to say who have made prior use of the Plaintiff's invention at certain places mentioned, viz., the *Primrose Works* and the *Rossendale Works*. The first objection that is taken on the part of the Defendants to the order is, that there is no jurisdiction to order

(1) 45 L. J. (Ch.) 746.
(2) Law Rep. 2 Eq. 459.
(3) 2 H. & M. 725.
(4) 16 Ch. D. 93.
(5) 20 Sol. J. 860.
(6) 7 Ch. D. 435.
(7) Law Rep. 19 Eq. 72.
(8) 2 Ch. D. 533.
(9) 3 Ex. D. 335.

the defendant in a patent suit to answer interrogatories and that the right course is to proceed by particulars and particulars only.

Now the Act of Parliament under which it is required that particulars should be delivered was passed in 1852, and that applies to a common law action, and at that time there was no power at Common Law to interrogate parties, that power having been conferred by the *Common Law Procedure Act*, 1854. The right to interrogate is conferred by the general orders, and I cannot say as a matter of principle that it can be laid down that the plaintiff is not entitled to interrogate the defendant, and *vice versâ*, with reference to these matters which may be covered by the particulars. I hold, therefore, on the general question that there is a right to deliver interrogatories, and provided the interrogatories are properly worded, interrogatories with reference to these very matters which ought to be covered by the particulars.

The 41st section of the Act of 1852 provides that the places at which and the manner in which the invention alleged to be used or published prior to the date of the letters patent has been used, are to be stated in the particulars, and upon that it is argued that there is a right on the part of the plaintiff applying for particulars to have only the places and not the names and addresses, and in support of that proposition the case of *Flower* v. *Lloyd* (1) is referred to. In the first place, I will observe that the party seeking the information is entitled to have the place or places at least, and the Court of Appeal when the question came before it in *Flower* v. *Lloyd*, struck out from the order of the Vice-Chancellor the words which related to the furnishing the names and addresses of the persons prior user by whom had been alleged and limited the order to a direction that the defendant should furnish further and better particulars as to the places at or in which, and in what manner the plaintiff's patent was known or publicly practised in *England* prior to a certain date. The Court said that under that order as varied, the defendants would still be required to furnish full and sufficient particulars. The same case afterwards came before *Field*, J., who was sitting in the Chancery

(1) 45 L. J. (Ch.) 746.

CHITTY, J. 1883 BIRCH v. MATHER.

Division for *Bacon*, V.C., and it is reported in the *Solicitors Journal* for 1876 (1). Under the order of the Court of Appeal the defendants delivered an amended notice of objections, and therein stated by whom the process had been used, by three persons whose names and addresses they gave, and by "other persons in *Birmingham* and *London* respectively." Upon that coming before *Field*, J., he said, "if the defendants know that these processes have been used by other persons in *London* and *Birmingham* besides those specified, they must know the persons by whom they have been used, and must give more specific information. I do not say that they need give the name and address of every such person, but they must give fair information." The result was, he ordered the defendant to furnish, as further and better particulars, the names and addresses of the persons by whom the prior user was alleged to have been made. Therefore, I am of opinion, that the plaintiff may, in a proper case obtain the names and addresses of the persons who are alleged to have made the prior user. The question has twice come before the Court. The first time was in *Finnegan* v. *James* (2). In that case interrogatories had been filed requiring the defendants to set forth full particulars specifying the names and addresses of persons by whom as well also as the places where the invention was alleged to have been used, and the defendant declined to set forth the particulars, on the ground that the matters inquired after related exclusively to the defence. The question before the Master of the Rolls was both as to the names and addresses, and places. When the case came on it was pointed out that the plaintiff had not furnished particulars of breaches. The Master of the Rolls allowed the exception, and he ordered the plaintiff to deliver particulars of the breaches complained of, and the defendant to put in a better answer to the interrogatories within fourteen days from the delivery of the particulars. The matter does not rest there, because a similar point came before Vice-Chancellor *Malins* in *Crossley* v. *Tomey* (3), and there the Vice-Chancellor compelled a further answer to an interrogatory inquiring the names and addresses of persons by whom the

(1) 20 Sol. J. 860.
(2) Law Rep. 19 Eq. 72.
(3) 2 Ch. D. 533.

prior user was made. It seems to me that these two decisions are binding on me. I may state further, that in both those cases the defendants were required to answer interrogatories notwithstanding the existence of the right which was conceded in *Finnegan* v. *James* (1), to either party to require particulars of breaches or objections. In other words, interrogatories were allowed in both those cases.

It seems to me on the whole in this case, under the circumstances, the order of the Registrar is right. As it is a peculiar case, I think it will be right to make the costs of bringing this summons before me, costs in the action.

Solicitors: *C. W. Dommett*, agent for *A. Macdonald Blair, Manchester; Shaw & Tremellen*, agents for *Needham, Parkinson, & Slack, Manchester.*

G. M.

In re LEMANN'S TRUSTS.

Trustee—"Incapable to act"—Personal Incapacity—Appointment of new Trustee—"Expedient"—Trustee Act, 1850, *s.* 32 [*Revised Ed. Statutes, vol. x. p.* 990].

The Court has jurisdiction, under s. 32 of the *Trustee Act*, 1850, to appoint a new trustee in the place of a trustee who has become incapable—as, for instance, through age and infirmity—of acting in the trusts.

A will contained a power for the trustees or the survivors of them to appoint a new trustee in the place of any trustee who should be "incapable to act." One of the surviving trustees, the testator's widow, having become, through age and infirmity, incapable of acting in the trusts, or of concurring in the appointment of a new trustee, or in a transfer of the trust estate:

The Court appointed a new trustee in her place and made a vesting order.

PETITION.

Frederick Adolphus Lemann, who died in 1859, by his will, made in 1840, gave all his property to his wife *Harriet Lemann*, and two other persons, upon trusts for his said wife for her life, and after her death for his children. And the testator declared that

(1) Law Rep. 19 Eq. 72.

CHITTY, J. 1883 *In re* LEMANN'S TRUSTS.

if either of his trustees should die .... "or be incapable to act," it should be lawful for the survivor or survivors to appoint a new trustee.

The testator's widow, who was one of the two surviving trustees of the will, had become incapable of acting further in the trusts through old age and consequent bodily and mental infirmity. It was therefore proposed to appoint, under the power in the will, a new trustee in her place, but a difficulty arose in making the appointment in consequence of her inability to execute any documents necessary for that purpose.

This petition was accordingly presented under the *Trustee Act*, 1850, by some of the beneficiaries, asking for the appointment of a new trustee and for a vesting order.

The petition was supported by evidence that Mrs. *Lemann* was seventy-nine years of age and was unable through failure of memory and decay of mental powers to concur in the appointment of any new trustee, or to execute or sign any deed or document for transferring the trust property to any new trustee who might be appointed, or in any way to attend to business matters.

Mrs. *Lemann* had been served with the petition, but did not appear.

M. Ware, for the Petitioners:—

I submit that this is a case falling within sect. 32 of the *Trustee Act*, 1850; for where there is, as in the present case, personal incapacity on the part of any trustee, the Court will consider it "expedient" to appoint a new trustee: *In re Bignold's Settlement Trusts* (1). Personal incapacity must, in each case, depend upon its own circumstances; but it would seem to include any incapacity short of lunacy.

Maidlow, and *S. B. L. Druce*, for other beneficiaries.

CHITTY, J.:—

I shall follow the principle laid down by the Court of Appeal in *In re Bignold's Settlement Trusts*. The Court of Appeal there laid down that under the 32nd section of the *Trustee Act*, 1850

(1) Law Rep. 7 Ch. 223.

—which gives the Court jurisdiction to appoint new trustees wherever it is expedient to do so—the Court has held it to be expedient to appoint a new trustee in the place of a trustee who is incapable of acting. One instance of incapacity is where the trustee is residing abroad. That is a case usually provided for by settlements and wills, but not, in terms, by the 32nd section. If a trustee is in such a condition that he cannot act properly in his trust, and is, in fact, incapable of acting, it is undoubtedly expedient for the Court to appoint a new trustee in his place, as it did in *In re Bignold's Settlement Trusts* (1).

From the evidence before me in this case, I am satisfied that Mrs. *Lemann* has become thoroughly incapacitated from acting in the trusts, and accordingly I make the order as prayed.

Solicitors: *J. R. Jennings; Stocken & Jupp; Ware, Hawes, & Wood.*

G. I. F. C.

In re MOATE'S TRUST.

Practice—Petition—Payment out of Court—Adjournment into Chambers—Jurisdiction—Trustee Relief Act, 1847 (10 & 11 *Vict. c.* 96), *s.* 2 [*Revised Ed. Statutes, vol. x. p.* 277]—*Masters Abolition Act*, 1852 (15 & 16 *Vict. c.* 80), *ss.* 26, 27 [*Revised Ed. Statutes, vol. xi. p.* 447]—*Despatch of Business Act*, 1855 (18 & 19 *Vict. c.* 134), *s.* 16 [*Revised Ed. Statutes, vol. xii. p.* 813]—*Cons. Ord.* XXXV. *r.* 1.

A trust fund having been paid into Court under the *Trustee Relief Act* by the trustee of a will, a petition was presented by parties interested for an inquiry as to the persons entitled and for payment out to the persons found entitled under that inquiry. Upon the petition coming on for hearing an order was made directing the inquiry, and adjourning the further hearing of the petition into Chambers:—

Held, that the proceeding having been properly commenced by petition under s. 2 of the *Trustee Relief Act*, the Court had jurisdiction, under s. 27 of the *Masters Abolition Act*, 1852 (15 & 16 Vict. c. 80), to adjourn the petition into Chambers.

Frodsham v. *Frodsham* (2) distinguished.

THE trustee of the will of *John Moate* deceased having paid into Court, under the *Trustee Relief Act*, 1847, a sum of £2980, representing the proceeds of the testator's residuary real estate, devised

(1) Law Rep. 7 Ch. 223. (2) 15 Ch. D. 317.

CHITTY, J. 1883 *In re* MOATE'S TRUST.

in trust for sale, a petition was presented under that Act by parties interested in the fund under the trusts of the will, asking for an inquiry as to the persons entitled to the fund, and for payment out to the persons who should be found entitled under that inquiry.

Upon the hearing of the petition before the Master of the Rolls on the 15th of January, 1881, an order was made directing an inquiry as prayed, and adjourning the further hearing of the petition to the Judge in Chambers.

The Chief Clerk having duly certified the result of the inquiry, the question arose whether there was jurisdiction to proceed with the petition in Chambers, and whether the further hearing ought not to be taken in open Court.

In order to have this question decided an application was now made on behalf of the Petitioners to restore the petition to the paper.

J. F. Hole Bethell, for the Petitioners:—

The difficulty has arisen on account of the decision in *Frodsham* v. *Frodsham* (1), where a vesting order as to stock having been made on summons in Chambers under the *Trustee Act*, 1850, the Court of Appeal discharged the order on the ground that the jurisdiction was doubtful. The question in the present case is, what is the effect of the legislation subsequent to the *Trustee Relief Act* as regards the procedure under that Act?

Sect. 26 of the *Masters Abolition Act*, 1852 (15 & 16 Vict. c. 80), is, no doubt, very wide in its terms; for after specifying certain classes of business which may be disposed of by the Judge in Chambers, it concludes thus, "and such other matters as each such Judge may from time to time see fit," or as may be directed by general order.

Then Cons. Order xxxv. r. 1, provides that the business to be disposed of by the Judge in Chambers shall, in addition to the matters specified in the above section, comprise certain other matters, including (sub-s. 3) applications under the *Trustee Relief Acts*, but only in cases where the trust fund does not exceed £300, so that the present case does not fall within that sub-section.

(1) 15 Ch. D. 317.

Sect. 16 of the *Despatch of Business Act*, 1855 (18 & 19 Vict. c. 134), however, modifies the general terms of sect. 26 of the *Masters Abolition Act*, 1852, for it contains a recital which is, in effect, a legislative declaration that orders made upon petition or motion in a summary way cannot be made upon application in Chambers. And in *Frodsham* v. *Frodsham* (1) the Court of Appeal considered that, having regard to that recital and the effect of Cons. Ord. xxxv. r. 1, and the course of practice ever since, it was doubtful whether the jurisdiction given by the *Trustee Act*, 1850, was intended by the Legislature to be exercised in Chambers, except in cases provided for by general order. Those observations would seem to apply equally to the summary jurisdiction under the *Trustee Relief Act*. It may be said that this case falls within sect. 27 of the *Masters Abolition Act*, which empowers the Judge "when sitting in open Court to adjourn for consideration in Chambers any matter which, in the opinion of such Judge, may be more conveniently disposed of in Chambers;" but the Judge cannot, by adjourning a matter into Chambers, confer upon himself any greater jurisdiction than is conferred upon him by sect. 26 as modified by subsequent legislation. He can only exercise a summary jurisdiction in such matters as are prescribed by general order.

No doubt the proceedings in this matter were instituted by petition, under sect. 2 of the *Trustee Relief Act*, but as the Master of the Rolls did not make any order for payment, another application for that purpose is now requisite, and the matter is still "business to be disposed of" within the meaning of Cons. Ord. xxxv. r. 1.

CHITTY, J.:—

In this case a petition was presented under the *Trustee Relief Act* for an inquiry and for payment out of a sum of money in Court. Sect. 2 of that Act requires that proceedings under the Act shall be commenced by petition, and accordingly in the present case the proceedings were commenced by petition. The Master of the Rolls, upon the petition coming on before him in open Court, adjourned it into Chambers, directing an inquiry as

(1) 15 Ch. D. 317.

CHITTY, J. 1883 *In re* MOATE'S TRUST.

to the persons entitled. The question is whether there was jurisdiction in the Master of the Rolls to adjourn the further hearing into Chambers. I do not entertain the slightest doubt that he had such jurisdiction—a jurisdiction which has, in fact, been repeatedly exercised up to the present moment.

The 26th section of the *Masters Abolition Act*, 1852, enables the Judge to dispose of certain specified matters in Chambers, "and such other matters as each such Judge may from time to time see fit, or as may from time to time be directed by any general order;" and the 27th section, which appears to be more material to the present application, enacts that the Judge may "adjourn for consideration in Chambers any matter which, in the opinion of such Judge, may be more conveniently disposed of in Chambers." That section, therefore, gives the Court unqualified power to adjourn into Chambers any matter that has been rightly commenced by the ordinary procedure by petition; and such a case is altogether untouched by the decision of the Court of Appeal in *Frodsham* v. *Frodsham* (1), and is altogether free from the objections raised by the Court in that case. That case seems, indeed, to have been misunderstood. What the Court of Appeal really decided was this: they said that where it was desired to proceed under the statutory jurisdiction conferred upon the Court by the *Trustee Act*, 1850, the proceedings ought to be initiated by petition or motion in open Court in the absence of any general order providing for such proceedings being commenced in Chambers. The Lords Justices *James* and *Brett* did not arrive at any clear conclusion as to the effect of the subsequent legislation upon the subject; they only thought it so doubtful that they said any application under that jurisdiction ought to be by petition or motion and not in Chambers. Lord Justice *Cotton*, however, went further, for he said he did not entertain so much doubt upon the matter, and considered that the original mode of proceeding under the *Trustee Act* in order to obtain a vesting order, namely, by petition or motion, had not been altered by the subsequent legislation; and that, as the vesting order had not been made upon a petition or motion as provided by the Act, it could not be sustained.

(1) 15 Ch. D. 317.

The sole point, therefore, in *Frodsham* v. *Frodsham* (1) was, In what mode are you to start your proceeding? Here the proceedings were started by petition as required by the *Trustee Relief Act*. They were therefore properly commenced, and, accordingly, I think the order adjourning the further hearing into Chambers was right. I may add that it is the constant practice of the Court to adjourn petitions into Chambers. One common and everyday case is that of a petition under the *Infants' Settlement Act* for the sanction of the Court to a settlement by an infant. When a petition is presented for that purpose it is a matter of course to adjourn it into Chambers.

Solicitors: *Wilde, Berger, & Moore.*

(1) 15 Ch. D. 317.

G. I. F. C.

PEARSON, J.

1882

Dec. 19, 20, 21.

NICHOLSON *v.* SMITH.

[1881 N. 892.]

Covenant to renew Lease—Condition Precedent—Notice of Option to renew—Payment of Fine—Notice by Secretary to Company—Notice to one of Three Trustees.

A lease of household property was granted in the year 1818 to the trustees of an insurance company for twenty-one years at a rent of £100, with a covenant that the lessor, his heirs or assigns, would from time to time, at any time before the expiration of the term, and also before the expiration of every succeeding term to be granted by every future or renewed lease, whenever required by the lessees or the persons interested in the term, or any succeeding term, and upon payment of a fine or premium of £1000, grant a renewed lease for twenty-one years, and in every such new lease there should be a similar covenant for renewal at or before the end of every twenty-one years, it being the intention of the parties that this lease should be renewable for ever at the option of the lessees, their executors, administrators, or assigns; and there was a covenant by the lessees that in case the option to renew was not exercised they would before the expiration of the term rebuild or reinstate the buildings and premises as a dwelling-house.

There were two renewals of the lease, one in 1839 and one in 1860, which last lease expired on the 24th of June, 1881. The persons then entitled under the original lessor were *G. S.*, who was tenant for life of a moiety of the property, and three trustees, of whom *G. S.* was one, of the entirety subject to the life interest.

Under arrangements made by the insurance company this lease with other property was vested in five trustees upon trust to indemnify a certain class of stockholders and subject thereto for the company.

One *H.* was secretary to these trustees and also to the company, and it was his duty to attend to the renewal of the lease.

On the 23rd of June, 1881, *G. S.* gave notice to *H.* that the lease would expire on the following day. *H.* answered that the directors of the company "would of course renew the lease." Subsequently renewal was refused:—

Held, in an action for specific performance, that it was not necessary for the lessees to pay the fine of £1000, or execute a new lease, before the expiration of the term, but that it was necessary that notice of an intention to renew should be given before the end of the term; and that the informal notice by *H.* to *G. S.* was sufficient.

Specific performance decreed, with payment of the premium and interest at £5 per cent. from the end of the prior lease.

THIS action was brought by the Plaintiffs, Sir *Charles Nicholson*, *W. Newmarch*, *J. W. Robins*, Sir *H. W. Tyler*, and *G. D. Whatman*,

who were trustees of the *Liverpool and London and Globe Insurance Company*, for the purpose of enforcing a covenant of renewal in a lease of certain buildings and premises occupied by the company at *Cornhill*, in the City of *London*.

The *Globe Insurance Company* was formed by a deed of settlement dated the 2nd of June, 1803.

By an indenture of lease dated the 29th of September, 1818, *Thomas Garle*, in consideration of £1000, demised to the trustees of the *Globe Insurance Company* a messuage or tenement formerly known as the *Royal Point*, situate on the south side of *Cornhill*, for twenty-one years from the 24th of June, 1818, at a yearly rent of £100, and the lessees covenanted with *Thomas Garle*, among other matters, that in case the said messuage or tenement should at any time during the said term thereby granted be laid into and made one with the adjoining premises then in the occupation of the *Globe Insurance Company*, or should be altered in its interior arrangement, then the lessees would, previous to the expiration of the term, rebuild any party-walls that should have been taken down, and restore in all respects the interior arrangement and disposition of rooms in the building, so that the same might again become, as it then was, a commodious dwelling-house for the habitation of a family. And the lease contained covenants by *Thomas Garle*, for himself, his heirs and assigns, with the lessees, their executors, administrators, and assigns, for quiet enjoyment and renewal for further terms of twenty-one years each, the lessees paying a fine of £1000 for each such renewal.

Thomas Garle was at the time of granting the lease seised in fee simple of the premises thereby demised. He died in February, 1832, and under his will the premises had in and before 1881 become vested as follows: The Defendant *George Smith* was tenant for life of one moiety, and the remainder in that moiety and the entire fee in the other moiety was vested in him and the two other Defendants, Mrs. *Garle* and Mr. *Thompson*, as trustees.

The lease of June, 1818, was renewed on the 24th of June, 1839, to the directors and trustees of the *Globe Insurance Company* upon the payment of £1000 fine, such lease containing a covenant for renewal similar to the covenant in the lease of 1818.

PEARSON, J.

1882

NICHOLSON v. SMITH.

Thomas Garle the son died in August, 1856.

By a lease dated the 24th of June, 1860 (but which was alleged to have been executed in the following month of September), and made between *John Garle* and *George Smith*, and *Mary* his wife, as the lessors of the one part, and four trustees of the *Globe Insurance Company* of the other part, the lessors, in consideration of £1000, granted a renewed lease of the premises for a further term of twenty-one years at the previous rent of £100 to the trustees of the insurance company; and the lease contained the following covenant on the part of the lessees: that in case they or the survivors or survivor of them, or the executors or administrators of the survivor, or other the person or persons possessed for the time being of the interest in the said term thereby granted, should not before the expiration of the said term avail themselves or himself of the option to them and him given as thereinafter mentioned in pursuance of the covenant in that behalf contained in the lease of the 29th of September, 1818, of requiring a new lease of the buildings and premises thereby demised, or should not accept such new lease and execute a counterpart thereof and pay the whole expense of such new lease and counterpart, and pay also to the person or persons entitled to receive the same on the expiration of such new lease, by way of fine, premium, or consideration, the sum of £1000, then the said lessees, their executors, administrators, or assigns should, previous to the expiration of the term, erect and build on the said premises, or convert the building then standing thereon into a good and substantial and complete house occupying the entire site of the ground thereby demised, and consisting of a basement storey and five storeys above, so as to render up to the person or persons entitled to the possession of the premises at the expiration of the term of twenty-one years thereby granted, a good, substantial, commodious dwelling-house fit for the reception and habitation of a family. And the said lease contained the following covenant on the part of the lessors:—

"And further that they the said lessors, their, his, or her heirs, and assigns shall and will from time to time at any time before the expiration of the said term hereby granted, and also at any time before the expiration of every succeeding term to be granted

by every future or renewed lease of the said piece or parcel of ground, building, and premises as hereinafter mentioned, whenever thereunto required by the lessees or the survivors or survivor of them, or the executors or administrators of such survivor, or other the person or persons for the time being possessed of the interest in the said term hereby granted or in every succeeding term to be granted by every such future or renewed lease (as the case may be), and upon receiving from them, or him, or her, such sum of money by way of consideration, fine, or premium as hereinafter mentioned, grant unto the lessees or the survivors or survivor of them, or the executors or administrators of such survivor, or other person or persons for the time being possessed of the interest in the said term hereby granted, or in such succeeding term as aforesaid (as the case may be), their, his, or her executors, administrators, or assigns, or unto such other person or persons as they, he, or she shall direct and appoint, a new lease of the piece or parcel of ground, building, and premises hereby demised, for a further term of twenty-one years, to commence from the expiration of the term hereby granted, or of other the term which shall for the time being have been last granted, in pursuance of this present covenant, as the case may be, but subject to the same yearly rent and to the same covenants, conditions, and agreements on the part of the lessees as are reserved and contained in the present indenture of lease, and with the usual covenants on the part of the landlord for quiet enjoyment, the lessees for the time being executing a counterpart of every such new or renewed lease for the time being and paying the whole expense of such new or renewed lease and counterpart, and paying also to the said lessors, their, his, or her heirs or assigns on the execution thereof respectively, by way of fine, premium, or consideration, the sum of £1000. And in every such new or renewed lease shall be contained a covenant on the part of the lessor or lessors to renew the said lease from time to time at or before the end of every twenty-one years, upon the request of the lessees therein, their executors, administrators, or assigns, and upon receiving a like fine of £1000 upon each such renewal, such respective leases to be at the same rent and to contain the same covenants as are reserved and contained in the

PEARSON, J. 1882 NICHOLSON v. SMITH.

present indenture of lease, including the covenant or covenants for renewal, it being the intention of the parties hereto that this present indenture of lease shall be renewable for ever at the option of the lessees, their executors, administrators, or assigns, in pursuance of the covenant in that behalf contained in the hereinbefore recited indenture of lease of the 29th of September, 1818."

By an Act of Parliament for regulating the powers of the *Globe Insurance Company*, it was provided that whenever a new trustee was appointed and a memorial of such appointment was enrolled in Chancery, all the property of the company should vest in the new trustee jointly with the continuing trustees.

By articles of agreement, dated the 31st of December, 1862, the *Globe Insurance Company* was amalgamated with the *Liverpool and London Insurance Company*, and by one of the articles of that agreement it was provided that each shareholder in the *Globe Company* should receive £20 stock in the *Liverpool and London Company*, and such stock might be exchanged for a perpetual annuity at the rate of £6 for every £20 of such stock, and in order to secure the payment of such perpetual annuities a sum of £1,000,000, being the amount of the paid-up capital of the *Globe Company*, was vested in five trustees, who were to hold the same in trust in the first place for payment of the said annuities, and subject thereto in trust for the *Liverpool and London Company*, as part of their general assets and revenue.

Under the aforesaid Act of Parliament and amalgamation deed, and by subsequent appointments enrolled in Chancery, the present Plaintiffs had become the appointed trustees of the "Million Guarantee Fund," and as such had become possessed of the property of the company, including the term created by the lease of 1860, and entitled to the benefits of the covenants for renewal contained in that lease and in the lease of 1818; and the Plaintiff, Sir *Charles Nicholson*, was chairman of the directors of the company, and the Plaintiff, *G. D. Whatman*, was another director of the company.

The Plaintiffs alleged that they therefore sufficiently represented the persons interested in the guarantee fund and the company respectively.

On the 23rd of June, 1881, the day before the expiration of the

lease of 1860, the Defendant, *George Smith*, wrote and sent to the *Liverpool and London, and Globe Insurance Office, Cornhill*, the following letter addressed to the directors of the company: — "Gentlemen,—As one of the joint owners with Mrs. *Louisa Garle*, of property in *Cornhill*, for which you pay a rent of £100 a year, I think it right to call your attention to the fact that the lease expires to-morrow." In answer to this letter, *Augustus Hendriks*, the resident secretary for *London* of the company, and also the secretary of the trustees of the "guarantee fund," wrote on the same day to the Defendant *George Smith*,—"Dear Sir,—Acknowledging receipt of your letter of this date, I have to state that the directors are of course prepared to renew the lease."

The Defendant *George Smith* on the following day (the 24th of June) wrote to Mr. *Hendriks*, saying that as the fine of £1000 had not been paid, and as the lease had been allowed to expire without compliance with the conditions of renewal, he could not, as jointly interested with others, accept the letter of Mr. *Hendriks* as a sufficient notice of renewal. He had therefore placed the matter in the hands of his solicitors. After some further correspondence between the solicitors on both sides, the Defendants having refused to grant a renewal of the lease, this action was brought claiming specific performance by the Defendants of the contract for renewal of the lease for twenty-one years.

By the statement of defence the Defendants alleged that *George Smith* in writing the letter of the 23rd of June, 1881, to *Augustus Hendriks* acted solely on his own account, and had no authority from the other Defendants to do any act in reference to the renewal of the lease, and that he did not act as their agent. And further, that *Augustus Hendriks* had no authority to act and did not act on behalf of the trustees of the guarantee fund or of the directors of the company in reference to the renewal. That the Defendants had never dealt with *A. Hendriks* as an authorized agent of the lessees or otherwise than as a secretary or medium of communication. That the Plaintiffs having failed to send in in due time a requisition for renewal, and having failed to pay the fine on renewal, were no longer entitled to have the lease renewed to them. And the Defendants by way of counter-claim asked that the Plaintiffs, having failed to exercise the option of

PEARSON, J. 1882 NICHOLSON v. SMITH.

renewal given them by the lease of 1860 within due time, might be ordered to give up possession of the piece of ground and premises comprised in the lease, and the Defendants claimed £5000 damages for the breach by the Plaintiffs of the covenant to reinstate the premises as a separate dwelling-house.

Several witnesses were examined whose evidence is referred to in the judgment.

Davey, Q.C., *Kingdon*, and *Wolstenholme*, for the Plaintiffs:—

We claim a right to have a renewal of this lease. The terms of the covenant are that the lessors will renew at any time before the expiration of the term whenever required by the lessees or persons interested in the term and upon payment of a fine of £1000, and it is expressly stated that the intention of the parties was that the lease should be renewable for ever at the option of the lessees. This is merely a covenant to do a certain thing, and a certain time is fixed, but that is not of the essence of the contract. The lessees might have required it to be done at an early period if they desired it, but as to the substance of the contract there is nothing to shew that time was essential in the performance of the contract. Then there is a covenant by the lessees that in case they shall not before the expiration of the term avail themselves of the option to require a new lease or shall not accept such new lease, they will erect certain buildings previous to the expiration of the lease. If the Defendants are right in their contention that this was a condition precedent, what time could be fixed for exercising the option? It must have been long before the expiration of the lease to allow time for the completion of the necessary building works. This clearly proves that time was not of the essence of the contract, and it was quite as much the duty of the lessors to offer a new lease for execution as for the lessees to require a new lease to be executed. We say that whatever was to be done would date from the time the request was made. We made the request on the day before the expiration of the term, and we ought to have a reasonable period for carrying out the conditions, that is, paying the money and executing the new lease. This is the principle on which *Wentworth* v. *Wentworth* (1) was

(1) Sty. 242.

decided, and also *Lawson* v. *Widdrington* (1). In *Bothy's Case* (2) it was held that a convenient time should be allowed for the performance of a condition under certain circumstances. Payment of interest will at all times remedy the delay and be a sufficient compensation. This is not the case of a lease for lives, as in *McAlpin* v. *Smith* (3) and *City of London* v. *Mitford* (4) where renewal was refused. In the latter case, moreover, laches was proved to have taken place. In *Rawstorne* v. *Bentley* (5) there had also been delay, but upon the delay being accounted for specific performance was decreed. In *Allen* v. *Hilton* (6) the want of a proper request prevented a renewal, but great stress was laid in that case upon the nature of the subject-matter, which was a mine. *Jackson* v. *Saunders* (7) is a case of a similar nature. *Harries* v. *Bryant* (8) was a case in which the Court refused renewal, because the plaintiff had not used reasonable diligence in ascertaining the death of a life which gave the right to renewal.

But supposing that a request for renewal is necessary it is not a condition precedent unless it appears to have been the intention of the parties that it should be so and that it is not inserted as a mere formal part of the contract: *Fry* on Specific Performance (9); and if there is any doubt about it the words must be construed most strictly against the covenantor: *Petersdorff's* Abr. "Conditions" (10); *Rubery* v. *Jervoise* (11). A Court of Equity will always relieve against mere lapse of time, *Jackson* v. *Saunders*, where there is no delay and the parties are acting in good faith: *Lennon* v. *Napper* (12); *Roberts* v. *Berry* (13).

There are no words here to shew that the parties intended this to be a condition precedent, and it clearly was the intention that the lease should continue for ever.

Then it is said that the letter written by *Hendriks* was not a formal request by the proper persons to the proper persons. In the first place, the words of the covenant are that the lessors will grant a

(1) 1 Lev. 85.
(2) 6 Rep. 30 a.
(3) 1 B. & B. 285.
(4) 14 Ves. 41.
(5) 4 Bro. C. C. 415.
(6) 1 Fonbl. Eq. 432.
(7) 1 Sch. & Lef. 443.
(8) 4 Russ. 89.
(9) 2nd Ed. p. 464.
(10) Vol. vi. p. 65.
(11) 1 T. R. 229.
(12) 2 Sch. & Lef. 682.
(13) 3 D. M. & G. 284.

PEARSON, J. 1882 NICHOLSON v. SMITH.

lease "whenever required by the lessees or persons interested in the term." There is no necessity for even a written request, so long as there is an expression of intention on the part of the lessees, and the very fact of the lessees continuing to hold possession of the premises was sufficient to shew their intention to hold under the contract: *Dowell* v. *Dew* (1); *Mills* v. *Haywood* (2). As to the authority of *Hendriks*, it is clear from the evidence that he was instructed by more than one of the trustees, and by the directors present at two different meetings, to take the necessary steps for effecting a renewal, and the directors were in truth the persons interested in the lease, and therefore the proper persons to give the notice, and this notice was given by *Hendriks* in writing to the only proper person to receive it. *Smith* was the tenant for life of one moiety, and one of the trustees of the other moiety, and notice to one trustee is sufficient.

In *Doe* v. *Watkins* (3) it was decided that notice to quit served on one of two tenants who held under a joint demise, was evidence that the notice reached the other. They also cited *Austin* v. *Tawney* (4) upon the question of notice.

Higgins, Q.C., and *Vaughan Hawkins*, for the Defendants :—

We submit that this covenant to renew cannot be enforced except upon the specific performance of the conditions precedent, which are payment of a fine of £1000, and notice that the lessees intend to exercise the option. Both these conditions must be fulfilled before the expiration of the term. Time is distinctly made of the essence of the contract. It is a privilege given to the lessees upon certain stipulations being complied with, and if not complied with the privilege is gone: *Davis* v. *Thomas* (5). The case of *Lord Ranelagh* v. *Melton* (6) is precisely this case, where the lessee had the option of purchasing the land comprised in his lease upon giving three months' notice of his desire to do so, and paying at the expiration of the notice the sum named, to the lessor. Three months' notice was given, which expired at the end of the term, but the money was not paid, and Vice-Chancellor

(1) 1 Y. & C. Ch. 345.
(2) 6 Ch. D. 196.
(3) 7 East, 551.
(4) Law Rep. 2 Ch. 143.
(5) 1 Russ. & My. 506.
(6) 2 Dr. & Sm. 278.

Kindersley held that payment could not be made after the period fixed, because in that case there would be no limit to the extension of time, and the lessor would have no right to compel the lessee to complete, while the lessee would have the right at any time after the three months to pay the money and compel the lessor to convey. So in *Weston* v. *Collins* (1), where the lessee had the option of purchasing upon giving six months' notice, and paying £2000, it was held that the payment of the money was a condition precedent, and the money not having been paid, no binding contract arose. It was in this case the duty of the lessee to prepare a new lease and tender it for execution with the money before the expiration of the twenty-one years' term. We say, therefore, that the option was only exerciseable, and must have been completely exercised during the term. The words, "that the lessees shall and will from time to time, at any time before the expiration of the term hereby granted," govern all the conditions, which must all be fulfilled before the expiration of the term: *Stephens* v. *De Medina* (2); *Brooke* v. *Garrod* (3).

But here the lessees had not made any request to exercise the option. There was only an intimation by the secretary that the directors would of course renew. That was not such a contract as could be enforced against the lessees. They had not bound themselves to take a new lease or to pay the fine. It was their duty to make such a strictly legal requisition upon us as to enable us to enforce specific performance. In truth we have never had any formal notice from the persons interested in the lease. No doubt *Hendriks* thought he was authorized to write the letter, and he thought the directors would renew, but he was not authorized by them or by the trustees in whom the lease was vested to write the letter. Suppose one of the trustees objected to the renewal, we could not in that case have enforced performance. It was necessary for all the trustees to join in exercising the option, and *Hendriks* could not act without the authority of all the trustees, and subsequent recognition of the authority of an agent will not make the notice good: *Doe* v. *Walters* (4); *Saffron*

(1) 34 L. J. (Ch.) 353. 11 Jur. N.S. 190
(2) 3 G. & D. 110; S. C. 12 L. J. (Q.B.) 120.
(3) 2 De G. & J. 62.
(4) 10 B. & C. 626.

PEARSON, J. 1882 NICHOLSON v. SMITH.

Walden Second Benefit Building Society v. *Rayner* (1); *Joy* v. *Birch* (2).

Then we say also that the notice if it was a notice was not given to the right person. *Smith* the Defendant was only entitled as tenant for life to a moiety of the property under the will of the original lessor, and he was one of the trustees of the other moiety. The notice should have been given in strict conformity with the terms of the covenant, which required notice to all the persons interested, which would include all the trustees: *Right* v. *Cuthell* (3).

Wolstenholme, in reply.

PEARSON, J.:—

I am much indebted to counsel for their arguments in this case. The question is whether or not the Plaintiffs are entitled to have a renewal of a lease of certain premises in *Cornhill*, to a renewal of which they are entitled if they have exercised the option which was given them by the lease under which they hold the premises. The Plaintiffs are trustees of what has been called in the argument, and what I will call, the "Million Fund," they are trustees for the *Liverpool, London, and Globe Insurance Company*, and the manner in which the "Million Fund" was created, and the manner in which they now are trustees of this lease of the property I must shortly describe.

It appears that in 1803 the *Globe Insurance Company* was formed. In 1818 they obtained a lease from the then owner in fee of this property in *Cornhill*, who was a gentleman named *Garle*. Under his will that property, stating it shortly, as to one moiety, is vested in three trustees, Mrs. *Louisa Garle*, Mr. *George Smith*, and Mr. *Thompson*. The other moiety Mr. *George Smith* is tenant for life of, with remainder to the same trustees for the benefit of the persons who take under the will under which they are trustees. The whole question depends upon the construction of the covenant to renew, which is to be found at the present moment

(1) 14 Ch. D. 406.
(2) 4 Cl. & F. 57; 10 Bli. (N.S.) 201.
(3) 5 East. 491.

in the lease of 1860, which is the second renewal of the lease of 1818. The lease of 1818 was renewed in the year 1839, and the lease of 1839 was again renewed in the year 1860, and being renewed in the year 1860, as I understand it, did not expire until the 24th of June, 1881. What happened was this, that on the 23rd of June, 1881, the trustees of the fund had given no notice whatever of their intention to renew, but in consequence of a letter written to their secretary at that time by Mr. *George Smith*, the gentleman who was tenant for life of one moiety, and a trustee of the other moiety, Mr. *Hendriks* wrote a letter which I will read presently. Now this lease being originally the property of the *Globe Insurance Company*, when the *Globe Company* amalgamated with the *Liverpool and London Company*, it was dealt with in this way: under the arrangements made between the two companies the shareholders in the *Globe* who declined to take shares in the amalgamated company, had the option of taking instead 6 per cent. perpetual annuities, and the payment of those perpetual annuities was secured by setting apart a sum of £1,000,000. Subject to the payment of those annuities, the fund belonged and belongs to the amalgamated insurance company. An Act of Parliament was obtained in the year 1864 to sanction what had been done between the two parties, and under that Act of Parliament, amongst other things, a secretary was to be appointed to the trustees of the fund. There were to be five trustees of the fund, one of whom was to be an independent person, a merchant of *London*, having no interest in either of the companies, and the gentleman selected to represent that interest, and to be the fifth trustee, was Mr. *Newmarch*, who is now dead. Mr. *Hendriks* was appointed secretary to the trustees, and he was also appointed secretary to the company. So that he combined in himself both offices, the office of secretary to the trustees on the one hand, and the office of secretary to the company on the other hand. A part of his duties, as secretary in both characters, was to look after the investments, to take care that all that was proper to be done with regard to those investments was done, and amongst other things what undoubtedly would have been his duty to do would have been, if he had no instructions at all, to bring before the directors the falling in of

PEARSON, J. 1882 NICHOLSON v. SMITH.

this lease, and the necessity there was for their declaring an option if they wished to have a renewal of the lease. It appears from the evidence that at a meeting of the 5th of March, 1880, a meeting which, as Mr. *Higgins* has pointed out, was informal in this respect, that there were only three trustees present where four were necessary for a quorum, Mr. *Newmarch* being in the chair, as they were looking over the investments, Mr. *Newmarch's* attention was directed to this very lease, and he then, addressing Mr. *Hendriks*, told Mr. *Hendriks* that it was his duty to look after the renewal of the lease, that he had done the same for the company before, and that now, as Mr. *Hendriks* was the secretary for the trustees and the secretary of the company, it was a part of Mr. *Hendriks'* duty to attend to this lease. Sir *Charles Nicholson* who is now, and was then, the chairman of the board of directors, was also present on that occasion; and on a subsequent occasion, in May, 1881, a conversation very much like that, took place between Sir *Charles Nicholson* and Mr. *Hendriks* at the conclusion of a board meeting, as Sir *Charles Nicholson*, no doubt accurately, described it, as the meeting was breaking up, and the directors were leaving the room. It was not a part of the business transacted formally at the meeting; but Sir *Charles Nicholson* having some conversation with Mr. *Hendriks*, and disputing with him as to whether or not the board-room in which they were then sitting had been built upon a part of the property which was owned by the company in fee or upon a part of the property which was held on lease from the *Drapers' Company*, Mr. *Hendriks* told him that he was mistaken as to both, for in fact it was built on part of the property which was held under this lease, and I see no reason to doubt that Mr. *Hendriks* was correct. Then some conversation similar to that which had taken place before occurred, Sir *Charles Nicholson* telling Mr. *Hendriks* that he looked to him to take care that the lease was renewed. However by some strange oversight no notice was given of the renewal, and apparently, but for the very honourable letter of Mr. *Smith* written on the 23rd of June, 1881, Mr. *Hendriks* would have allowed the matter to slip out of his memory, and no letter would have been written, such as was written by Mr. *Hendriks*. How far that letter is sufficient I will consider presently.

I must now look to see what the terms of the lease are, what the terms of the covenant are, and what is the proper construction to be put on those terms. The lease being dated on the 24th of June, 1860, is made between the persons who were then entitled to grant the lease of the one part, and certain persons therein named, who are described as "directors and trustees of the *Globe Insurance Company*, for and on behalf of the said company" of the other part, and then, leaving all the first part of the lease, I find this covenant:—[His Lordship then read the covenant for renewal already set out in the statement of the case.] I believe I am right in saying that the covenant here is in the same words as the covenant in the original lease of 1818 with the exception that the words "at any time" are omitted after the words "from time to time," but with that exception the covenant is the same. In addition to that there is another covenant in the lease (also set out in the statement) that in case the lessees should not before the expiration of the term avail themselves of the option given them, in pursuance of the covenant in that behalf contained in the lease of the 29th of September, 1818, of requiring a new lease of the said piece or parcel of ground, buildings, and premises thereby demised, or should not accept such new lease and execute a counterpart thereof, and pay to the person or persons entitled to receive the same on the execution of such new lease, by way of fine, premium, or consideration, the sum of £1000, then and in such case they, the lessees, should previous to the expiration of the term thereby granted erect and build on the said piece or parcel of ground, or convert the present building then standing thereon into, a good, substantial, and complete messuage or tenement occupying the entire site of the ground thereby demised.

Now it is said, on the part of the Plaintiffs, that assuming they gave no notice before the 24th of June, 1881, assuming, that is, that the notice given by Mr. *Hendriks* was an insufficient and invalid notice, nevertheless they are entitled to renewal of the lease, because they say, first of all, that the words "whenever thereunto required" do not constitute a condition precedent, that it was not necessary to their obtaining a new lease that they should have made any request before the 24th of June, and that even if it was necessary that they should have made a request before the 24th

PEARSON, J. 1882 NICHOLSON v. SMITH.

of June, nevertheless, if the lessors were to bring an action of ejectment after the 24th of June, it would be a sufficient answer to that action to say, although we made no previous request, we are perfectly willing to accept a lease now, and you must therefore grant us a lease now, and all that you can claim from us is this, that inasmuch as there has been a delay in paying the premium of £1000, we must pay interest upon that sum from the time when it ought to have been paid, and they say that the Court of Chancery, this Court, is entitled to extend the time for making the requisition, even if a requisition were necessary, upon the ground that the Court of Chancery can do perfect justice between the parties by requiring them to pay interest upon the £1000 from the time when they ought to have paid it. They say that the substance of the whole agreement is, that there was to be a perpetual lease of the land in question subject to this, that at the end of every twenty-one years there was to be a payment of a fine of £1000, and that being the substance, the Court would not insist (where there has been no misconduct on their part, and where there has been no intentional delay, and where there has been no playing fast and loose with the bargain) upon that requisition, or treat the absence of it, as fatal to their right to renewal, but would regard the covenant as giving them a right to have a renewed lease upon payment of the £1000 now and the interest.

On the other hand, it is said that if you read this covenant properly, there were two things that were absolutely necessary to the Plaintiffs obtaining a renewal of the lease. The first was that there should be a request for a renewal before the expiry of the term, and, secondly, that the £1000 should also have been paid before the twenty-one years' term granted by the lease of 1860 came to an end. I do not agree with either of the parties upon the construction of the lease. I certainly do not agree with what the Defendants say, that there is anything whatever in this agreement that could require the payment of the £1000 before the expiry of the twenty-one years' lease. On the contrary, I think it very plain that there is no stipulation of that kind. There is a most complete distinction made between the requisition, assuming the requisition to be necessary, before the expiry of the term, and the payment of the £1000, because, adopting the argument of the

Defendants that the requisition was to be made during the continuance of the twenty-one years, the stipulation with regard to the payment of the £1000 is, that it is to be paid on the execution of the lease, and I think I should be making the agreement between them simply a vexatious agreement if I were to say that it was absolutely necessary that the lease itself should be engrossed and executed before the expiration of the term of twenty-one years. I find most distinctly, in the first place, that the requisition, giving it the strict construction which the Defendants put upon it, is to be made at any time before the expiration of the lease, and that there is to be a covenant in any renewed lease that they will renew at the expiration of the twenty-one years' term. If they renew at the expiration of the twenty-one years' term, looking to the clause which says that the £1000 is to be paid on the execution of the lease, it seems to me impossible to hold that the £1000 is to be paid before the lease had actually come to an end. I think the intention of both parties was that at the expiration of the lease, if not before, but at all events at the expiration of the lease, at the option of the lessees, there was to be a new lease granted, and that whenever the documents had been prepared and came to be executed, the payment of the £1000 was to be made *eo instanti*. This is further confirmed by the other clause which I have read, which points out this, that in any case if the lessees should not avail themselves of the option, which could not be decided until the expiry of the lease, or if, having availed themselves of the option, they could not pay the £1000, which would not be ascertained until the lease was tendered to them for execution, and they then refused to pay the £1000, then certain events are to follow, that is to say, the lessees are then to be bound to restore the house into a dwelling-house. I therefore dismiss altogether from my consideration that requisition which the Defendants relied upon, that the £1000 ought to have been paid before the expiration of the term.

There remains the more serious question whether or not the requisition for the new lease was not to be made within the term of twenty-one years. Now in the opening of Mr. *Davey*, which was, like his usual arguments, very clear and very able, he pressed me very strongly with an authority which is certainly

PEARSON, J. 1882 NICHOLSON v. SMITH.

more like this case in many respects than any other, namely, the case of *Lennon* v. *Napper* (1), which contains a great deal of what is extremely valuable, as coming from Lord *Redesdale*. In the passage from which Mr. *Davey* read, Lord *Redesdale*, speaking of a case which related to a renewal of a lease, says this (2): "The meaning of the parties to these contracts is to secure a continuance of the tenure and rent, and payment of the fines, and to prevent a conversion of the tenure by enjoyment without renewal, into a fee farm: for, notwithstanding the payment of rent, if there was to be no renewal from time to time, the presumption of a fee farm would arise; and where the covenant for renewal is upon a peppercorn fine, which is often the case, the preservation of the tenure, and of the remedies for the rent, must be the only object." Then Lord *Redesdale*, stating with very great accuracy the doctrines of this Court with regard to contracts of sale, applies to the case of a renewal of a lease the same equity which the Court is in the habit of applying daily to contracts of sale, and says that where the Court sees the substance of a contract is the payment of money, the Court will not allow the contract to be avoided simply because there has been a delay in the payment of purchase-money, seeing that the delay can be fully compensated for by the payment of interest. But looking at the case of *Lennon* v. *Napper*, I am of opinion that that passage which I have read must be held to apply to the practice of the Court in *Ireland* with regard to the renewal of leases, a practice which at the time when Lord *Redesdale* delivered his judgment had been, I think I am not wrong in stating, so wild that the Legislature had thought it right to restrain it by an Act of Parliament, which was passed purposely for enacting under what circumstances only leases might be renewed, and in fact, as far as I understand it, limiting the power which the Court of Chancery had exercised formerly of granting indiscriminately renewals of leases when the time within which they ought properly to have been renewed had lapsed. I do not think I should be justified in transporting that practice or founding my decision upon the statement of Lord *Redesdale* in that case, more especially when I find that in another case in the year 1807, to which Mr. *Davey* also referred me, *City of London* v.

(1) 2 Sch. & Lef. 682. (2) 2 Sch. & Lef. 685.

Mitford, Lord *Eldon* says (1), "I shall not notice the cases farther than by observing that there is a great distinction between this and the cases upon leases for lives; and that, where there has been default of this kind in making a request, unless it has been excused by circumstances, there is no authority for decreeing a specific performance." I confess that looking to this document, looking to what was the manifest intention of the parties, namely, that if the lessees desire it there should be a renewal of the lease, I should be exceedingly willing, if I thought I had the power, to adopt Lord *Redesdale's* view. I think in a case like the present I should be only doing justice to the parties in saying that where there had been, as there was in this case, a manifest slip with regard to giving notice for renewal of the lease, where the intention of both parties was that upon payment of a fine of £1000, the lease should be continued in perpetuity, I should be justified in saying that the proper construction of this lease would be that if even after the expiration of the lease within any reasonable time (there being no misconduct in the lessees, there being no attempt on their part to do anything that was tricky or treacherous) they agreed to accept the lease, they ought to have the right to do it. But I do not feel myself justified by what I believe to have been the practice and the decisions of this Court in adopting Lord *Redesdale's* views. I think I am bound therefore to hold that it was necessary under the covenant in this lease that there should be a request made, and that the option of the lessees should be exercised during the continuance of the lease, and upon this ground, that I think at the expiration of the lease, according to the doctrine in this country, the lessor was entitled to know the moment the lease expired, whether or not he had a tenant or whether he must look out for another tenant.

But it is further argued on the part of the Plaintiffs that there has been a sufficient notice given. Now the notice which was given is this: On the 23rd of June, 1881, the day before the lease expired, Mr. *Smith* wrote this letter to the directors of the *Globe Insurance Company*: "As one of the joint owners with Mrs. *Louisa Garle* of property in *Cornhill*, for which you pay a rent of

(1) 14 Ves. 58.

PEARSON, J. 1882 NICHOLSON v. SMITH.

£100 a year, I think it right to call your attention to the fact that the lease expires to-morrow." On the same day that letter was answered by Mr. *Hendriks* in these terms: "Acknowledging the receipt of your letter of this date, I have to state that the directors are, of course, prepared to renew the lease." It is said on the one hand that that is a proper notice. On the other hand it is said that the notice is insufficient, for this reason: in the first place that Mr. *Hendriks* had no authority to write the letter, in the second place that the letter was not sent to the persons to whom notice ought to have been given. Mr. *George Smith* was tenant for life of one moiety, he was co-trustee with two other persons of the remainder in this moiety and of the other moiety. It is said that notice ought to have been given to all the persons interested, and by some person who was duly authorized, as I understand the argument, by a resolution of the trustees of the fund certainly, and possibly also by a resolution of the directors, that the lease was to be renewed, for that otherwise Mr. *Hendriks* had really no authority, and the letter was the letter simply of an outsider having no authority whatever to write it.

Now the lease was held undoubtedly in the names of the trustees of the "Million Fund," and by the trustees of the "Million Fund" as a security for the annuities charged on that fund, but it was by way of indemnity only. There was no right for them to apply any part of the interest of that million of money unless the company made default in paying the annuities, and until default was made the lease, and all the income of it, was to go to the company itself. I consider, therefore, that the persons who are really and truly mainly interested in this fund are the *Globe Company* itself. It was a part of their assets simply subject to a special indemnity in favour of the annuitants who had taken six per cent. annuities. But whether the company or whether the trustees were the persons who ought to have given notice, Mr. *Hendriks* united in himself the office of secretary to them both. I have stated that from the evidence given to me in the box by Mr. *Hendriks* and by Sir *Charles Nicholson*, I consider that it was a part of the duty of Mr. *Hendriks* to give due notice before the lease expired that the trustees and directors both wished the lease to be renewed, and I consider that Mr. *Hendriks* therefore

was acting as he was bound to act, only rather later than I think he ought to have acted in giving this notice.

Then it is said the notice was not given to the proper person. Well, it was given to Mr. *Smith*, who, as I have said, united in himself the character of tenant for life of one moiety, and of a trustee, not only of the other moiety, but of the moiety of which he was tenant for life subject to his own tenancy for life. It is said that that is not a sufficient notice. I have not yet been informed distinctly by the counsel for the Defendants, to whom the notice ought to have been given, but at all events they seem to argue this, that it should have been given to Mr. *Thompson* and Mrs. *Garle*, who were the other trustees, as well as to Mr. *Smith*. I have come to the conclusion that inasmuch as Mr. *Smith* was one of the trustees, a notice to one of the trustees was perfectly sufficient, and therefore I conclude that the notice given by Mr. *Hendriks* was a requisition given within the time within which the notice was necessary, and that consequently the Plaintiffs are entitled to that which they ask.

Some trifling observation was made upon the form of Mr. *Hendriks*' letter: I do not think any form was necessary. No requisition in writing is required by the covenant. The lease is to be a lease which is to be renewed in perpetuity at the option of the lessees. I think the option of the lessees and their desire to remain tenants was stated fairly and broadly upon the letter, not the less so because even in the lease of 1860 the lessees are expressly stated to be trustees for the directors of the company. It would be, in my judgment, a departure from the deed if I were to hold that any formal notice in any formal words was requisite with regard to this option when no notice in writing is required, and when it is expressly stated in the lease that the lease is to continue at the option of the lessees. I think the option of the lessees was sufficiently plainly declared in this letter, and I must hold, therefore, that the letter being written on the 23rd of June, 1881, and being sent to one of the three trustees, who was also a tenant for life of the moiety which had not fallen in to the trusteeship up to that time, was a sufficient notice and a sufficient declaration of the option on the part of the lessees to take a renewal of the lease.

PEARSON, J. 1882 NICHOLSON v. SMITH.

That being so, it only remains for me to declare that the trustees of the fund are entitled to a renewal of this lease, that the lease must be executed, and of course the £1000 must be paid on the execution of the lease, with interest at the rate of £5 per cent. There remains only the question of costs, and inasmuch as I have decided upon the ground that there was a proper notice given, I think the Plaintiffs are entitled to the costs of the action.

Solicitors: *Palmer & Bull; Beachcroft.*

T. W. G.

PEARSON, J. 1882 *Dec.* 21.

BEAZLEY *v.* SOARES.

[1880 B. 142.]

Right to Trade Name—Mortgagee—User of Name.

The mortgagee of stock-in-trade and goodwill, and of the right to use a name, never having used the name and not intending to use the name, cannot obtain an injunction to restrain persons claiming under the mortgagor from using the name.

IN 1872, *W. P. Margetson* and *R. C. Bell* became the purchasers of a mineral water manufacturing business carried on under the style of *Fleet & Co.* By an indenture dated 25th of March, 1876, they mortgaged the premises on which the business was carried on and all the machinery, plant, and effects to one *J. B. Arthy* by way of security for £2200. This mortgage afterwards became vested in one *H. Byrne.*

On the 12th of January, 1878, *Margetson & Bell* mortgaged the premises, machinery, stock, &c., and the goodwill, and the use of the name *Fleet & Co.* to the Plaintiff, *G. Beazley*, father-in-law of *Margetson*, to secure sums not exceeding £2500.

On the 8th of May, 1878, *Margetson & Bell* assigned to one *E. L. Ernest* the premises, machinery, stock, &c., and the goodwill; and gave him a power of attorney to use the name *Fleet & Co.*, and covenanted not to carry on a similar business within fifty miles of *London*. *Ernest* was a trustee for *Byrne*, who for some time carried on the business under the style of *Fleet & Co.* In February, 1879, *Byrne*, under the powers of the mortgage deed of the 25th of March, 1876, sold the premises, stock, &c., to the

Defendants, *Soares & Richards*. And by a deed dated the 31st of December, 1879, *Byrne* assigned to *Soares & Richards* the goodwill of the business, machinery, stock, &c., and the right to use the style of *Fleet & Co.*, but subject to the mortgage to *Beazley*.

Beazley and *Margetson* brought this action against *Soares & Richards*, claiming an injunction to restrain them from using the style of *Fleet & Co.*, or holding out to the public that they were entitled to the goodwill or business of *Fleet & Co.*, until they had paid to the Plaintiffs the amount due under the mortgage of the 12th of January, 1878.

The dealings between *Beazley* and *Margetson* were very obscure, but in the opinion of the Court *Beazley* intended to give up his rights to his son-in-law *Margetson*.

Barber, Q.C., and *Swinfen Eady*, for the Plaintiffs:—

We as first mortgagees of the name have a right to use the name. In the mortgage of 1876 the goodwill and right to use the name was not included. No doubt the Plaintiffs have never used the name, but if they want to use it they must first prevent others from using it: *Potter* v. *Commissioners of Inland Revenue* (1).

Higgins, Q.C., and *G. Woods*, for the Defendants.

PEARSON, J.:—

I am asked to make an entirely novel decree in a novel case, and in spite of the persuasion of the learned counsel for the Plaintiffs, I decline to make it. [His Lordship then stated the facts of the case, and proceeded:—] The first question to which I have to address myself is, whether *Margetson* having become beneficially interested in this mortgage, could by any possibility set up his interest against his covenant with *Ernest* in the deed of the 8th of May, 1878. If I were bound to decide that question, I think I should come to the conclusion that *Margetson* had lost his right and was bound by his covenant, and that he could not be heard in this Court seeking to restrain *Ernest*, or those who claim under *Ernest*, from using the name of *Fleet & Co.* I say,

(1) 10 Ex. 147.

PEARSON, J. 1882 BEAZLEY v. SOARES.

however, most distinctly that I do not decide that point, and I should not like to decide it without hearing further argument.

Then comes this curious point. The premises and the stock-in-trade were assigned, or have become vested in the Defendants, and they and their predecessors, whose name they claim, have been carrying on the business since May, 1878, under the name of *Fleet & Co.* down to the present time, or I may take it simply down to the time when the writ was issued, without any obstruction being offered to them by *Beazley* or by *Margetson*. At any rate, whatever may be *Beazley's* case, I must assume that they were carrying on the business under the name of *Fleet & Co.* with the knowledge and connivance of *Margetson*, and I am now asked to restrain them in an action which I consider to be the action of *Margetson* and not the action of *Beazley*, from continuing to carry on their business under the name of *Fleet & Co.* This is not a case in which a man who is using his own name, or a name which he is entitled to use, is interfered with by somebody else assuming the same name; nor is it a case where there is an attempt to deceive the public by one man trading under a name which he is not entitled to trade under, and which does not belong to him, and who thus imposes his goods on the public; so that even if *Beazley* were the sole Plaintiff I should certainly come to a conclusion against him, and I should not grant an injunction in his favour when he has never used the name, is not using, and does not allege that he intends to use the name. I do not understand how there can be a goodwill or a right to use a name kept alive in this way for a period of years during which the person who claims to have the right to use the name never used it, nor asserted his right to use it, nor even asserts when he comes into Court that he intends to use the name. I do not think the Court of Chancery ever granted an injunction in a case of that kind. I have asked for an authority, and I have been told there is no authority to be found in the books for the proposition that an injunction has been granted under such circumstances, and I decline to be the first Judge to grant such an injunction. This being the state of facts now brought before me, the only thing I can do is to dismiss this action, and dismiss it with costs.

I must further say that in many other respects, after hearing

PEARSON, J.
1882
BEAZLEY v. SOARES.

the evidence of *Beazley* in the box, I am by no means satisfied that this is an honest action. I think that if the action had been heard out to the end I must have come to the conclusion that it was not an honest action, and that on this ground also I must have dismissed it.

Solicitor for Plaintiffs: *G. E. J. Gibney.*
Solicitors for Defendants: *West, King, & Co.*

C. M.

PEARSON, J.
1883
Jan. 12.

In re HONE'S TRUSTS.

Will—Bequest to Daughter to be subject if she survived Testator to the Trusts of her Settlement—Death of Daughter in Testator's Lifetime leaving Issue living at his Death—Wills Act (1 *Vict. c.* 26), *s.* 33 [*Revised Ed. Statutes, vol. viii. p.* 36].

A testator gave his residuary personal estate to his children in equal shares, and directed that the share of his daughter, Mrs. *B.*, if she survived him, should be subject to the trusts of her marriage settlement and paid to the trustees thereof. Mrs. *B.* died in the testator's lifetime, but left children surviving him. Her husband having taken out administration to her he claimed her share:—

Held, that under sect. 33 of the *Wills Act* (1 Vict. c. 26), Mrs. *B.* must for all the purposes of the will be taken to have survived the testator, and that the share must be paid to the trustees of the marriage settlement and not to the administrator.

THE Rev. *R. B. Hone*, by will dated the 9th of April, 1871, gave his residuary estate to trustees upon trust for his eight children therein named in equal shares. He declared that if any child of his should die in his lifetime without leaving issue living at his, the testator's, decease the share of such child should be divisible equally among such of the testator's children as should survive the testator. And he directed that the share of his daughter, Mrs. *Bathurst*, in case she should survive him should be deemed and taken to be part of the funds comprised in her marriage settlement, dated the 27th of February, 1867, and be subject to the trusts thereof, or such of the said trusts as at the time of the testator's decease should be subsisting or capable of taking effect, and that the receipt of the trustees or trustee for the time being of that settlement to whom the share should in that event be transferred and paid should be a good discharge.

PEARSON, J.

1883

In re HONE'S TRUSTS.

The testator died in May, 1881. Mrs. *Bathurst* had died in April, 1876, leaving children who survived the testator. Her husband took out administration to her estate.

The trustees of the will (of whom Mr. *Bathurst* was one) paid the share of Mrs. *Bathurst* into Court under the *Act for the Relief of Trustees* (10 & 11 Vict. c. 96). Mr. *Bathurst* petitioned for payment of it to him as his wife's legal personal representative. A question was raised whether apart from the special clause in the will as to Mrs. *Bathurst's* share it was not brought into the settlement by a covenant therein contained for settlement of property to which "during the said intended coverture" Mrs. *Bathurst*, or she and her husband in her right, should become entitled, but the Court gave no opinion upon this question.

Maclean, for the Petitioner:—

[PEARSON, J.:—Suppose that the husband had died in the testator's lifetime, and the wife had survived the testator, must not her share according to the terms of the will have been settled?]

I think it must.

[PEARSON, J.:—Under the *Wills Act*, s. 33, the bequest is to take effect as if she had survived the testator. Must not she then be taken for all the purposes of the will to have survived him so as to make the directions for settlement apply?]

As was said by Vice-Chancellor *Kindersley*, in *Pearce* v. *Graham* (1), "The effect of the 33rd section of the *Wills Act* was simply to prolong her life by a fiction for a particular purpose, namely, that the legacy might not lapse, but certainly not for any other purpose."

[PEARSON, J.:—But the Vice-Chancellor there held that the covenant on which this question arose applied to an actual coverture, and that even if the Act had prolonged the coverture it would have been a fictitious one only and not within the covenant. Here the life being prolonged in order that the legacy may not lapse the trust attached to the legacy goes with it.]

I submit not. The testator must be presumed to know the effect of sect. 33, and he might have provided that if the legacy

(1) 32 L. J. (Ch.) 359.

took effect under that section it should be settled, but he has not done so. His words ought to be taken in their proper natural sense as applying to an actual survival by Mrs. *Bathurst* and not to a survival by fiction of law, and as a matter of fact Mrs. *Bathurst* has not survived the testator. *Winter* v. *Winter* (1) explains the policy and operation of the section, and that operation ought not to be extended.

PEARSON, J. 1883 *In re* HONE'S TRUSTS.

W. Pearson, Q.C., and *Cadman Jones*, for the trustees of the settlement, were not called upon.

PEARSON, J.:—

The 33rd section of the *Wills Act* enacts that if any person being a child or other issue of the testator to whom any property shall be devised or bequeathed shall die in the lifetime of the testator leaving issue living at his death "such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." No one contends that such contrary intention does appear in this will. I must, therefore, read it as if Mrs. *Bathurst* had survived the testator, and it contains a provision that in case she survives him her share is to be brought into and to be subject to the trusts of her settlement. I am, however, in effect asked to say that although she is to be taken to have survived the testator, she is entitled to her share for her own absolute use instead of its being subject to the trusts of her settlement. I think, however, that I should be defeating both the object of the Act and the intention of the testator were I thus to hold. I am here to consider Mrs. *Bathurst* as having survived, and in that case the clause in the will comes into immediate and most beneficial operation. The money must, therefore, be paid to the trustees of the settlement.

Solicitors: *Johnson, Upton, & Co.*; *Tucker & Lake.*

(1) 5 Hare, 306.

W. W. K.

POLLOCK, B.

1883]

Feb. 2, 3.

STRICKLAND *v.* SYMONS.

[1881 S. 968.]

Trustee—Carrying on Business—Advances—Charge of Trustee—Right of Creditor.

By a marriage settlement, a lunatic asylum was assigned to trustees on trust at the request of the husband and wife to sell and to stand possessed of the proceeds of the sale for the benefit of the wife and children; but the trustees were to allow the husband to carry on the business of the asylum without paying any rent, but paying certain premiums and other moneys. The husband became bankrupt, and thereupon the surviving trustee of the settlement entered into possession of the asylum, and carried on the business until the asylum was sold for a large sum of money. A tradesman had supplied the trustee with goods for the use of the asylum, and brought an action claiming payment out of the trust funds of the settlement:—

Held, that on the construction of the settlement the trustee would not have been entitled to recover moneys advanced by him for the purposes of the asylum, and that consequently the tradesman who had no better right could not recover.

Affirmed on appeal W.N. 1884, p. 26.

BY an indenture bearing date the 2nd day of April, 1867, and made in contemplation of the marriage of Dr. *James Thomson Sabben* and *Mary Frances Birkett*, certain leasehold hereditaments at *Stoke Newington*, called *Northumberland House*, were assigned to *Henry Samuel Symons* and *Henry Edward Symons*, upon trust at the request in writing of *James Thomson Sabben* and *Mary Frances Sabben* (therein called *Mary Frances Birkett*), during their joint lives, and after the decease of either of them or the survivor of them during his or her life, and after the decease of the survivor at the discretion of the trustees or trustee, to sell the trust premises, and also the business of a lunatic asylum carried on there, and the goodwill thereof, and as to the goodwill thereof, either together with the trust premises or separately, and to stand possessed of the proceeds of the sale upon the trusts declared by an indenture of the same date. By the indenture of the same date it was declared that the trustees should stand possessed of the moneys to arise from the sale of the trust premises and the goodwill upon trust to invest the same as therein mentioned, and should stand possessed of the moneys so

invested on certain trusts for the benefit of Dr. and Mrs. *Sabben* and their children. And it was further declared that until the trust premises should be sold as aforesaid, it should be lawful for Dr. *Sabben* to carry on the business of an asylum upon the said premises without paying any rent for the same other than the rents payable under the leases thereof, but paying certain sums of money thereinafter covenanted to be paid. The indenture contained covenants by Dr. *Sabben* for the payment of the premiums on certain policies of insurance and for the payment to the trustees by Dr. *Sabben* in instalments of the sum of £10,000 for the benefit of the children of Mrs. *Sabben* by a former husband. It was further provided that as between the first trust premises (which were defined to consist of the proceeds of the sale of the asylum), and the annual income thereof, and the said sum of £10,000, the first trust premises and the income thereof should stand charged with the payment of the premiums in payment of which default should have been made by Dr. *Sabben*. And that the first trust premises and the annual income thereof should respectively be held by the trustees as an indemnity for the purpose last aforesaid. But it was declared that the trustees were not obliged (except from time to time when specially required in writing by Mrs. *Sabben* or some other person for the time being interested in the trust premises) to enforce any of the covenants or to apply any part of the trust premises or of the income thereof in payment of the premiums.

Dr. *Sabben* carried on the business of the asylum for his own benefit until the 7th of July, 1875, when he filed a petition for liquidation of his affairs, under which one *Sydney Smith* was appointed trustee. He however appeared not to have interfered in the business of the asylum; and shortly after the institution of this suit he disclaimed all interest therein. Immediately on the liquidation Dr. *Henry Edward Symons*, the surviving trustee of the marriage settlement, entered upon the management of the asylum with a view (as alleged by the Plaintiff) to the preservation of the business and to a sale thereof as a going concern under the trusts of the settlement. He carried on the business until April, 1876, when the asylum was sold for £18,500.

The Plaintiff, *J. R. Strickland*, was an upholsterer at *Gravesend*,

POLLOCK,B. 1883 STRICKLAND v. SYMONS.

and while the asylum was carried on by Dr. *Symons*, the Plaintiff supplied the asylum with furniture, bedding, and other necessaries required for the business, some of which were sold to the patients at a profit and others of which were sold with the asylum. A balance of £500 was due to the Plaintiff, for which sum and interest and costs he had recovered judgment in the Common Pleas Division against Dr. *Symons*. This money had not been paid, and Dr. *Symons* had no means out of which to pay the same.

The Plaintiff brought this action against Dr. *Symons* and Dr. and Mrs. *Sabben* and their children, alleging that if Dr. *Symons* had paid for the goods supplied he would be entitled to be recouped out of the trust funds, and that the Plaintiff was entitled to be put in his place; and claiming to have the amount of the judgment debt, interest, and costs raised out of the trust funds of the settlement which represented the proceeds of the sale of the asylum and the goodwill thereof.

The Defendants alleged amongst other things that Dr. *Symons* did not carry on the business as trustee, but with a view to a purchase by himself or as agent for the trustee in the liquidation and for *Alexander Ramsay*, to whom Dr. *Sabben* had mortgaged his interest, and who had further made advances for carrying on the asylum.

Dr. *Symons* had brought an action against *Ramsay* for the recovery of money advanced for the purposes of the asylum, and Vice-Chancellor *Hall* had declared that Dr. *Symons* and *Ramsay* were entitled to recover the money advanced by them, out of the moneys paid by the patients, and had directed accounts accordingly. It was alleged by the Defendants that this action had been brought by arrangement between the parties.

Witnesses for the Plaintiff stated that there were about eighty patients in the asylum, and that it sold for much more as a going concern than if the asylum had been closed.

Higgins, Q.C., and *Dauney*, for the Plaintiff:—

Dr. *Sabben* being unable to carry on the business it was the duty of the trustee of the settlement to protect the property and retain the lunatics there, as the property would have been much

less valuable if the lunatics had been allowed to go and the connection had been lost. Were the lunatics to be left to themselves unprovided for? The property was sold for a very large sum, most of which was in fact for goodwill, the result of the money advanced to keep up the establishment. If Dr. *Symons* had himself advanced the money he would clearly have been entitled to be repaid, and the Plaintiff stands in his place and has his rights. It has been shewn that Dr. *Symons* was carrying on the business as trustee, and not as agent for Dr. *Sabben* or *Ramsay*. If not, the judgment of Vice-Chancellor *Hall* could not have been given. If the Plaintiff had been a party to that suit he would have come in with the others. A large sum of money has been obtained by the care of Dr. *Symons*, and he must have a charge upon it. Even if he had not been the trustee he would be entitled to be repaid for money advanced as for salvage. In either case the Plaintiff is entitled to stand in his shoes, or independently as a salvor: *Marlow* v. *Pitfeild* (1); *In re Johnson* (2).

Barber, Q.C., and *Kirby*, for Mrs. *Sabben* and her children:—

The Court is asked to create an entirely new equity. A mere trustee for sale cannot lay out money and charge it on the estate. In *In re Johnson* there was an express direction to carry on the business: *Ex parte Butcher* (3). They were stopped by the Court.

Townsend, for *Ramsay*, as to his costs.

Higgins, in reply, as to the rights of Dr. *Symons*.

POLLOCK, B.:—

I certainly should have paused before I delivered my judgment in this case if I did not feel that in so deciding I have had the fullest benefit of all the arguments which could be addressed for the Plaintiff and for the Defendants, and without also, I may say, thinking that in the conclusion at which I have arrived I do not disturb anything that can be called a settled principle upon which the Courts have acted, or any decided case, by which, of course, I should feel myself bound.

(1) 1 P. Wms. 558. (2) 15 Ch. D. 548.
(3) 13 Ch. D. 465.

POLLOCK, B. 1883 STRICKLAND v. SYMONS.

The Plaintiff in the case, Mr. *Strickland*, is a person whose position is to be pitied. He, an honest trader at *Gravesend*, gave credit to a large amount, first, as it appears, to Dr. *Sabben*, the proprietor of a lunatic asylum, and, secondly, to Dr. *Symons*, who was ostensibly carrying on that same lunatic asylum. With any claim he might have against Dr. *Sabben* we have nothing to do on the present occasion. With regard to his claim against Dr. *Symons* he has stated in the statement of claim, and has proved the supply of goods, all of which were fit, proper, and necessary for carrying on the lunatic asylum. He obtained a judgment in the Common Pleas for the amount of his debt, and in the present action he asks to be put, with regard to that claim, in the same position as his debtor is, who being a trustee may or may not have a remedy over against the *cestuis que trust* whose estate he has to deal with. Then comes the question, Has he any such remedy? I certainly should not consider that there was any argument against Mr. *Strickland* in his peculiar position to say that his right was somewhat novel, if it was well founded in principle; but I have to ask myself the question whether it is well founded in principle. I think that no difficulty arises with regard to what has been the principle by which similar cases have been governed. That principle is very well stated in the judgment of the Master of the Rolls in *In re Johnson* (1). He cites *Ex parte Garland* (2) as a well known decision of Lord *Eldon's*, and he also cites *Ex parte Edmonds* (3), in which Lord Justice *Turner* says: "They proceed upon the principle that the executor or trustee directed to carry on the business having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and thus become creditors of the fund to which the executor or trustee has a right to resort." I need only here remark that that doctrine has, if one may say so, of course been kept within reasonable limits. Then the Master of the Rolls states what was said by Vice-Chancellor *Bacon* in *Owen* v. *Delamere* (4): "The Court will give effect to the trust which has been created by the testator, and will keep separate and applic-

(1) 15 Ch. D. 553.
(2) 10 Ves. 110, 120.
(3) 4 D. F. & J. 488, 498.
(4) Law Rep. 15 Eq. 134, 139.

(38 Jur. N.S. 629, 632

able only to purposes of the trust that estate which the testator designated and directed to be employed for that purpose."

We have no need to trouble ourselves here with that salutary doctrine whereby the creditor is allowed to stand in the shoes of the trustee of the debtor; but we must certainly bear in mind that other principle that the creditor is not to be put in any better position than the trustee himself, that is to say, the creditor should have no lien upon the fund or claim to be paid out of the fund in respect of which the trustee himself would not be entitled to any lien or claim.

Then comes the question in this particular case: is the trustee, Dr. *Symons*, entitled to say in this Court or elsewhere that he as trustee was entitled to make payments for the purpose of keeping this lunatic asylum as a going concern, and therefore getting a larger price when it came to be sold? We may pass over all the general rules which are applicable not merely to trustees but to executors, and to all other persons upon whom is cast the custody of particular property, and who, of course, must have some reasonable power beyond the mere retention of the property as it passes through their hands. I take that view to be expressed generally in this way: wherever even an executor finds himself in possession of property which cannot be treated as so much specie in respect of which nothing can be done to improve it or to keep it going, but finds himself in possession of a business, such as an ordinary shop, or factory, or anything else which requires essentially something to be done for it, there he must do that something whatever it may be. A ship is a very good illustration of this principle. What would be said of a man who was executor of a shipowner, either part owner or whole owner, if he immediately sold the ship on the spot without allowing a profitable voyage to be completed, or some expenditure upon the ship to take place in order to put her in a position to earn freight? Those contingencies are dealt with in the cases cited before me, and it is unnecessary to dwell upon them any longer. But as it appears to me the guiding observation to be made in this case is, that this is not the case of a trustee who is appointed upon an emergency, or upon whom some duty as trustee has been imposed from the exigency of the case. He is a trustee

POLLOCK, B. 1883 STRICKLAND v. SYMONS.

under a very carefully drawn marriage settlement, and certainly I and any one else before whom this deed comes will look carefully to see what was the intention of the parties, and will exhaust that intention first before giving force to any supposed power which may arise under an emergency. Now what are the terms of this marriage settlement? It is drawn very carefully, and there is an independent deed which deals with this particular property in question. The settlement shews what part Dr. *Sabben* is to take in the management of the property, and nothing could have been easier than to have said that the trustee should carry on the lunatic asylum under the direction of Dr. *Sabben*, and that he should pay over to the trustee certain sums so as to create a provision for the children, who were still infants. Again nothing could have been easier than to have said that Dr. *Sabben* should himself carry on the lunatic asylum, but that on his ceasing to carry it on, or becoming bankrupt, or on certain events taking place, there should be a cesser of all the right on his part to carry it on, and the trustee should have a right to enter upon the property either to carry on the business, or to sell it, or in any other way to deal with it as those who drew that settlement thought right to arrange. But that is not this settlement, and I must follow the provisions of the settlement. The settlement expressly provides that Dr. *Sabben* is to carry on the lunatic asylum—about that there is no doubt—and not only that, but the provision for the children is not made by handing over any portion of the proceeds of the lunatic asylum expressly, but it is made, as one would expect it would be, in this way: Dr. *Sabben* is to pay over certain sums of money until a certain sum is made up to the trustees for the benefit of the children. Now, so long as that state of things exists there is no control in the trustees of the settlement over the carrying on of the lunatic asylum. I am obliged to ask myself this question; not only what is the effect of this deed with regard to Dr. *Sabben* himself, but what is the effect of it with regard to those who claim under him, and who may have rights arising out of the carrying on of the asylum, as indeed the trustees in bankruptcy have in the present case; and it does not follow that because all these parties, not having their solicitors or counsel at their elbow, have not accurately carried

out or possibly accurately observed what were their peculiar rights in each event that their conduct can make any difference on the proper construction of this settlement by the Court. It seems to me that so long as Dr. *Sabben* carried on that business, the business was entirely his, uncontrolled by the trustees, and that if he failed to carry on the business, and was obliged to put his affairs in liquidation, then the assets arising out of that business, and the rights of the creditors upon that business, would come into liquidation as between Dr. *Sabben* and his creditors, in which the trustees were in no way interested. The result is that so far as this business is concerned it belonged to him, and after the liquidation belonged to the trustee in the liquidation, though it so happens that Dr. *Symons* interfered in a way which I will allude to presently.

To go on with the construction of the deed, we find a provision shewing distinctly that those who drew this deed contemplated the event of the lunatic asylum passing out of the hands of Dr. *Sabben* and becoming the property of the trustees for the purpose of sale on request. If that request had been made then would have arisen the question which Mr. *Higgins* has put forward very clearly, as to duties of the trustee not to sell at the moment, but to sell in such a manner as to preserve the goodwill and get the best price. That has not arisen. What has arisen has been this, that for some reason, not only has he made no request while he is carrying on the business and making the payments, but his wife made no request, and although for certain purposes now that the property has been actually sold, the fact of the request has been recited in the conveyance, because no good title could be made without it—yet at the very date of all these events which we have been considering, no notice whatever had been given, nor was any notice given or assumed to have been given until the date of the conveyance to the purchaser. That being so, it seems to me, that from the 7th of July, 1875, which was the date of the petition for liquidation by Dr. *Sabben*, until the assignment, that business and the assets of that business were governed by the settlement, and were part of the property and assets of Dr. *Sabben*. This makes it unnecessary for me to inquire with

POLLOCK, B. 1883 STRICKLAND v. SYMONS.

any great nicety with regard to what was the position of Dr. *Symons* the trustee, but I may observe this, that after the 7th of July no doubt Dr. *Symons* came upon the premises, and did what was right and what was proper in endeavouring to keep up the business for the benefit of his sister and her children. Whether he remained in possession and carried on the business as an intending purchaser, so that credit was given to him as an intending purchaser, or whether he carried on the business under a mistaken idea as to his duty as trustee, it is unnecessary now for me to inquire. It is very likely he might be an intending purchaser, and yet he might be entitled to come to this Court and say, "Although I myself had an intention of purchasing, still that was not a settled matter. I was entitled to deal with it as if the asylum being in the market, I, amongst others, being a potential purchaser, and while that state of things existed I, as trustee, was entitled to spend money on the asylum and to carry it on for the benefit of the general assets." That may or may not be, but the answer to all these questions now is that they do not arise within the purview of this settlement. It seems to me, therefore, that with regard to the money which has been expended by him, and in particular as having relation to this credit that was given to him by the Plaintiff Mr. *Strickland*, it is immaterial to go into or follow it further when I have pointed out that he had no right to place himself in that position, or to seek to bind the estate by so doing. If he had no right, of course it follows that Mr. *Strickland* has no right as against him or to stand in his place against the *cestuis que trust*.

There is one matter which I should mention before I leave this case, and that is the judgment of Vice-Chancellor *Hall*. I do not know that I should think it necessary to do so, except that I should be very sorry to have it imagined for one moment that upon the information now before me I took any step which could be supposed to shew that I entertained any opinion which was contrary to the view expressed by so eminent and so painstaking a Judge as Vice-Chancellor *Hall*, or that I was taking any course which would seem to be contrary to the course which he took. In truth, I do not think it is so, for this reason. During

this hiatus which occurred between the 7th of July and the liquidation and the actual sale of the lunatic asylum, money was advanced—not only was credit given for those goods supplied by Mr. *Strickland*—but money was advanced by Mr. *Ramsay*. Mr. *Ramsay*, it appears, had advanced sums amounting to very nearly £2000. That sum, of course, was in peril. Dr. *Symons* himself also had made some similar payments which were also in peril, and in respect of which he was entitled to protect himself if he could. The most convenient course of doing that was supposed to be by an action being commenced by Dr. *Symons* against Mr. *Ramsay* in which the Court would declare the rights of the parties, and in that action they asked for an account. It was stated in the statement of claim, and truly, that Mr. *Ramsay* had advanced the sums, and it was stated that they had been employed for the benefit of the lunatic asylum. It was also stated that by means of these advances considerable payments had been received from the patients, and the decree of the Court was that an account should be taken with respect to all those matters, and the result of it was this, that if after that account was taken there was any fund in Court which was produced by the payments by the patients, then those who had advanced these large sums of money, should be decreed to be entitled to that fund. That seems to me to be a very different thing from deciding what I am now called upon to decide.

I do not think it is necessary for me to enter any further upon any question of the other branch of Mr. *Higgins*' argument, which was, that this was one of those matters in which the matter should be treated as what he called, by way of illustration, a sort of salvage claim, and that the Plaintiff in this case might be entitled to say, "If I am not entitled under the rule of standing in the shoes of the trustee, I am entitled as the person who has kept this thing going, and thereby a larger sum having been produced from the sale, I am entitled to be paid out of it." It is enough to say, I think, that there is no such general doctrine of that kind which can apply, when a settlor of property has made specific arrangements, and the trusts have been carefully prepared, and a settlement and a deed have been drawn, so that the Court must be bound according to the intention of the parties

POLLOCK,B. as expressed in the settlement and deed. It seems to me that I could not decide this case in favour of the Plaintiff without breaking the trusts and the intention of that settlement, and therefore my judgment must be for the Defendants.

1883

STRICKLAND v. SYMONS.

Solicitors for the Plaintiff: *Harries, Wilkinson, & Raikes.*

Solicitors for Mrs. *Sabben* and her children: *E. Smith & Co; W. J. Smith.*

Solicitors for *Ramsay*: *Hurford & Taylor.*

C. M.

GREAT WESTERN RAILWAY COMPANY *v.* SWINDON AND CHELTENHAM EXTENSION RAILWAY COMPANY.

C. A. 1882
CHITTY, J. *Nov.* 17.
C. A. *Dec.* 20, 21.

[1882. G. 2553.]

Railway Company—Lands—Easement—Right to cross Line of another Company —Lands Clauses Consolidation Act, 1845, *s.* 16 [*Revised Ed. Statutes, vol. ix. p.* 633].

By the Act incorporating the *S. Railway Company* the *Lands Clauses Act*, 1845, except where expressly varied thereby, was incorporated therewith, and it was enacted that the words to which meanings were assigned by the *Lands Clauses Act* should in the special Act have the same meanings unless there was something in the subject or context repugnant thereto. The *S. Company*, "subject to the provisions of this Act," were empowered to purchase any of the lands in their deposited plans. By sect. 8, which was inserted for the protection of the *G. W. Railway Company*, it was provided (sub-sect. 1) that the *S. Company* should not enter upon or interfere with or execute any work over or under the line of the *G. W. Railway* until plans had been approved by the engineer of the *G. W. Company* or an engineer appointed by the Board of Trade. Sub-sect. 2 provided that the railway of the *S. Company* should be carried in one place over and in another under the *G. W. Railway* by a bridge and tunnel. By sub-sect. 4 the bridge and tunnel were to belong to the *G. W. Company*. By sub-sect. 8 the *S. Company* were not to interfere with the land of the *G. W. Company* except for the purposes of the above crossings, and it was enacted that the *S. Company* should not purchase or take any land of the *G. W. Company*, but that the *S. Company* might purchase and the *G. W. Company* should grant an easement or right of using the crossings in perpetuity. By sub-sect. 9 every dispute between the two companies respecting the above matters or any of them was to be referred to arbitration. The *S. Company* were proceeding to make the crossings, and the *G. W. Company* brought their action to restrain them from doing so, on the ground that the capital of the *S. Company* had not been subscribed, and that under the 16th section of the *Lands Clauses Act* they could not proceed to put in force any of their powers for the compulsory purchase of land until it had been subscribed:—

Held, by *Chitty*, J., that, as under their Act the *S. Company* had the right of taking an easement over the land of the *G. W. Company*, the word "land" in sect. 16 of the *Lands Clauses Act* as incorporated in this Act must be held to include this easement, and that the *S. Company* must be restrained from taking steps to acquire such easement until their capital had been subscribed:—

Held, by *Jessel*, M.R., and *Bowen*, L.J. (*dissentiente*, *Cotton*, L.J.), that as the provisions of the special Act for referring disputes to arbitration provided a better means of ascertaining the compensation to be paid for

C. A.

1882

GREAT WESTERN RAILWAY CO. *v.* SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.

crossing the line of the *G. W. Company* than the verdict of a jury, and the powers of the *Lands Clauses Act* as to compulsory purchase were therefore not necessary for the purpose of assessing the compensation, there was no necessity for giving to the word "land" in the *Lands Clauses Act* as incorporated with the special Act a more extensive meaning than it had in the *Lands Clauses Act* standing alone, which did not include a new easement, that what the *S. Company* were proceeding to do was therefore not a compulsory taking of land within sect. 16 of the *Lands Clauses Act*, and that the decision below could not be sustained.

THIS was an action to restrain the *Swindon and Cheltenham Extension Railway Company* from proceeding to acquire an easement over certain property of the *Great Western Railway Company* until the capital of the Defendant company had been duly subscribed.

The Defendant company was incorporated by the *Swindon and Cheltenham Extension Railway Act*, 1881 (44 & 45 Vict. c. cxlvi.). By sect. 2 it was enacted that (*inter alia*) the *Lands Clauses Consolidation Acts*, 1845, 1860, and 1869, "are (except where expressly varied by this Act) incorporated with and form part of this Act." Sect. 3: "In this Act the several words and expressions to which meanings are assigned by the Acts wholly or partially incorporated herewith have the same respective meanings unless there be something in the subject or context repugnant to such construction." The section went on to say that the expression "the company" meant the company incorporated by the Act; and the expression "the *Great Western Company*" the *Great Western Railway Company;* and the expression "the railway" or "the railways" the railways authorized by the Act. Sect. 5: "Subject to the provisions of this Act the company may make and maintain in the line and according to the levels shewn on the deposited plans and sections the railways hereinafter described, with all proper stations, sidings, approaches, works, and conveniences connected therewith, and may enter upon, take, and use such of the lands delineated on the said plans and described in the deposited books of reference as may be required for that purpose." [Then followed a description of three railways, distinguished as Nos. 1, 2, and 3.]

Sect. 8: "For the protection of the *Great Western Company* the following provisions shall have effect (that is to say):—

"(1.) The company shall not enter upon or interfere with the

railway of the *Great Western Company*, or any of the lands or works of that company, or execute any works whatever under, over, or affecting the same, until the company shall have delivered to the *Great Western Company* plans and drawings of such intended works, and those plans and drawings shall have been approved in writing by the principal engineer for the time being of the *Great Western Company*, or, in the event of his failure for fourteen days after the delivery of the plans and drawings, until the same shall have been approved by an engineer to be appointed on the application of the company by the Board of Trade; and all the intended works shall be executed by the company at their sole expense in all things according to such approved plans and drawings, and to the reasonable satisfaction of the said engineer for the time being of the *Great Western Company*, or in case of difference by an engineer to be appointed by the Board of Trade.

"(2.) In constructing the railways or either of them through or over the land and property of the *Great Western Company* the company shall not deviate from the centre line shewn on the deposited plans where Railway No. 1 crosses the railways of the *Great Western Company* to a greater extent than 100 feet on either side of the centre line without the previous consent in writing of that company under their common seal; and the said Railway No. 1, where the same is intended to cross the main line to *Bristol* of the *Great Western Railway* shall be carried over that railway by means of a bridge of one span of not less than seventy-five feet on the square and a headway of not less than sixteen feet." [Then followed a power for the *Great Western Company* to make additional openings under the new railway near the bridge for the purpose of carrying additional lines under the railway.] "And the said Railway No. 1 shall be carried under the main line to *Gloucester* of the *Great Western Railway* by an archway or bridge of not less than thirty feet in width between the parapets, and the company shall, within six months of being required to do so by the *Great Western Company*, construct and completely finish at their own expense and hand over to the *Great Western Company*, for the free and uninterrupted use of that company, an extension of the said archway or bridge upon one or both sides thereof as may be required by the *Great Western Company*, such extension to

C. A. 1882

GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.

be in the aggregate of sufficient width to carry two additional lines of rails with such spaces between them, or between the additional lines and the existing lines, as the *Great Western Company* may require." [Then followed a power to the *Great Western Company* to make further extensions.] "And such crossings of the railways of the *Great Western Company* shall be effected in such a manner as not to injure the stability of the railway and works of the *Great Western Company* or of the company in any way whatever."

(3.) Provisions for payment by the company of expenses incurred by the *Great Western Company* during the making the crossings in watching the railway and works.

"(4.) The archway or bridge and any extensions thereof constructed by the company, and the incidental works connected therewith for carrying Railway No. 1 under the main line to *Gloucester* of the *Great Western Railway*, shall from and after the completion, and subject and without prejudice to the duty and obligation of the company for ever thereafter at their own expense to uphold and maintain the same in good and sufficient repair, and otherwise in respect thereof, be the property of the *Great Western Company*, and be deemed part of the structure of their said main line to *Gloucester*."

(5.) Provision for payment by the company to the *Great Western Company* of all damages occasioned to the latter company by the works.

(6.) Provisions that the company and the *Great Western Company* respectively should keep in repair the bridges and other works constructed by them respectively, by which Railway No. 1 should be carried over the main line to *Bristol* of the *Great Western Company*, and under the main line to *Gloucester* of that company.

(7.) Provision for compensation to the *Great Western Company* for any interference with the traffic on their railways.

"(8.) Except for the purposes of the crossings of Railway No. 1, and for the junction of Railway No. 3 with the main line to *Bristol* of the *Great Western Railway*, the company shall not take or acquire any rights over any land of the *Great Western Company*, and, save as aforesaid, nothing in this Act contained shall extend to authorize or enable the company to take, or enter upon, or use,

either temporarily or permanently, any of the lands of the *Great Western Company*, or to alter, vary, or interfere with the railways or either of them of that company, or with any of the works thereof, further or otherwise than is necessary for the construction and maintenance of the railways by this Act authorized, without the consent in writing in every instance, for that purpose first had and obtained, of the *Great Western Company* under their common seal. And with respect to any lands of the *Great Western Company* which the company are by this Act from time to time authorized to use, enter upon or interfere with, the company shall not purchase and take the same, but the company may purchase and take, and the *Great Western Company* shall sell or grant accordingly, an easement or right of using the same in perpetuity for the purposes for which but for this enactment the company might purchase and take the same."

"(9.) If any dispute shall arise between the *Great Western Company* and the company respecting the matters and provisions aforesaid, or any of them, such dispute shall be settled by an arbitrator to be agreed upon between the parties, or in case of difference to be appointed, on the application of either party, by the president for the time being of the Institution of Civil Engineers in *London*. The costs of such arbitration to be in the discretion of such arbitrator."

"(10.) Nothing in this Act contained shall extend to prejudice, diminish, alter, or take away any of the rights, privileges, or powers of the *Great Western Company* otherwise than is by this Act expressly provided."

"Sect. 24. The powers of the company for the compulsory purchase of lands for the purposes of this Act shall not be exercised after the expiration of three years from the passing of this Act."

"Sect. 28. Persons empowered by the *Lands Clauses Acts* to sell and convey or release lands may, if they think fit, subject to the provisions of those Acts and of this Act; grant to the company any easement, right, or privilege, not being an easement of water, required for the purposes of this Act, in, over, or affecting lands; and the provisions of the *Lands Clauses Acts* with respect to lands and rent-charges, as far as the same are applicable in this behalf,

C. A. 1882

GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.

shall extend and apply to such grant, easements, rights, and privileges as aforesaid respectively."

"Sect. 31. If the railway is not completed within five years from the passing of this Act, then on the expiration of that period the powers by this Act granted to the company for making and completing the railway, or otherwise in relation thereto, shall cease to be exercised except as to so much thereof as is then completed."

In March, 1882, the *Swindon Company* sent to the principal engineer of the *Great Western Company* sketch plans and drawings of the bridges by which they proposed to cross the line of the *Great Western Railway*, and on the 31st of March the *Swindon Company* served upon the *Great Western Company* notice to treat for the purchase of the requisite easements over the line. On the 4th of April the secretary of the *Great Western Company* wrote to the secretary of the *Swindon Company* stating that the subscription of the capital of the *Swindon Company* was a condition precedent to the exercise of its compulsory powers, and asking whether the capital had been subscribed. No answer was given to this question. On the 22nd of May the secretary of the *Swindon Company* sent to the secretary of the *Great Western Company* detailed plans and drawings. On the 30th the secretary of the *Great Western Company* replied that until the question whether the condition precedent of subscribing the capital had been complied with had been answered, the directors of the *Great Western Company* considered it premature to open the question of the plans.

The engineer of the *Great Western Company* not having approved of the plans, the *Swindon Company* applied to the Board of Trade to appoint an engineer to approve of them, and about the end of July the engineer so appointed gave a certificate of approval.

The *Swindon Company*, on the 4th of August, prepared to commence the works for carrying their line by bridges across the line of the *Great Western Railway*, but the *Great Western Company* resisted their entry. The *Swindon Company* then determined to proceed under sect. 85 of the *Lands Clauses Act*, and on the 29th of August they gave the *Great Western Company* notice that they

should apply to the Board of Trade to appoint a surveyor to determine the value of the easements for carrying the line over the line of the *Great Western Company*. This valuation was made, and the *Swindon Company* paid into the bank the amount of the valuation, and on the 25th of October, 1882, gave a bond to the *Great Western Company* as provided by sect. 85.

On the 31st of October the *Great Western Company* commenced their action, claiming an injunction to restrain the *Swindon Company* from entering upon or continuing upon the lands mentioned in their notice to treat, and from putting in force any of the powers of their special Act or of the *Lands Clauses Act*, in relation to the compulsory taking of the said lands or any easement therein, until their capital had been duly subscribed. An injunction was moved for accordingly on the 17th of November, 1882, before Mr. Justice *Chitty*.

Romer, Q.C., and *R. S. Wright*, in support of the motion, contended that the taking the easement in question was a taking of land within the meaning of the 16th section of the *Lands Clauses Act*, and therefore that the provisions of that section applied.

Ince, Q.C., and *Upjohn*, for the Defendants, contended that the word "lands" did not include an easement in land, and that a railway company could not purchase a mere easement, and therefore that the provisions of the 16th section did not apply.

The following authorities were cited and referred to during the argument: *Pinchin* v. *London and Blackwall Railway Company* (1); *In re Metropolitan District Railway Company and Cosh* (2); *Macey* v. *Metropolitan Board of Works* (3); *Great Northern Railway Company* v. *East and West India Docks, &c., Railway Company* (4); *Giles* v. *London, Chatham, and Dover Railway Company* (5); *Taylor* v. *Corporation of Oldham* (6); *Hill* v. *Midland Railway Company* (7); *Co. Litt* (8).

(1) 5 D. M. & G. 851.
(2) 13 Ch. D. 607.
(3) 33 L. J. (Ch.) 377.
(4) 7 Rail. Cas. 356.
(5) 1 Dr. & Sm. 406.
(6) 4 Ch. D. 395.
(7) 21 Ch. D. 143.
(8) 20 a.

C. A. 1882

GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.

The *Lands Clauses Consolidation Act*, 1845, was also referred to (1).

CHITTY, J.:—

On this motion the *Great Western Railway Company* ask for an injunction to restrain the Defendant company, the *Swindon and Cheltenham Extension Railway Company*, from entering upon or continuing upon certain lands belonging to the *Great Western Railway Company* described in a notice to treat served on the 12th of August, 1882, and from putting in force any of the powers of the Defendants' special Act, or the *Lands Clauses Act* of 1845, in relation to the compulsory taking of the said lands or any easement therein until the capital of the Defendant company has been duly subscribed. The motion is founded upon the 16th section of the *Lands Clauses Act*, 1845, and the question is whether that section applies to the case as it appears upon the facts. The special Act incorporates in the 2nd section the *Lands Clauses Act*, except where expressly varied by the Act, and by sect. 5 provides that subject to the provisions of this Act, which of course includes the *Lands Clauses Act*, the company may enter upon, take, and use the lands delineated in the deposited books of reference, which lands include lands of the *Great Western Railway Company*.

The 8th section, which has been inserted for the protection of the *Great Western Railway Company*, contains provisions, so far as I need notice them, to this effect. The 2nd sub-section authorizes the Defendant company to construct a bridge over a portion of the *Great Western Railway Company's* lands, and to carry a bridge in another part under a portion of the *Great Western Railway Company's* lands. The clause also contains a provision that in constructing the railways through or over lands the property of the *Great Western Railway Company*, the Defendant company shall not deviate from the centre line to a greater extent than 100 feet on either side. Then the 8th sub-section, which is the most important one, provides towards the close of it that "with respect to any lands of the *Great Western Company*, which the company are by this Act from time to time authorized to use,

(1) Sects. 6, 7, 16, 18, 21, 63, 127.

enter upon, or interfere with the company shall not purchase and take the same, but the company may purchase and take, and the *Great Western Company* shall sell or grant accordingly an easement or right of using the same in perpetuity for the purposes for which but for this enactment the company might purchase and take the same."

On behalf of the Defendant it is said that on the true construction of the 16th section of the *Lands Clauses Act* the promoters of an undertaking are not authorized to take an easement, and that proposition may be accepted as a general one where the *Lands Clauses Act* is incorporated in a special Act, without the special Act going on to authorize the taking of easements. It has been decided for more than a quarter of a century in the case of *Pinchin* v. *London and Blackwall Railway Company* (1), that a railway company or the promoters of an undertaking cannot take a mere easement in the lands, that is the promoters are not authorized to take an easement to be created *de novo* out of lands as by making a tunnel, and saying they only require the easement of passing through that excavation in the earth which is thus made. It is not intended to be asserted in support of this proposition that the promoters of the undertaking cannot take an easement where there is a subsisting easement in the land which they are authorized to take. Of course where they take the land they take all subsisting easements which at the time affect the land and extinguish those easements necessarily, because they take the land itself, the fee simple, and all the rights which are involved in it.

In the present case it is not necessary to say whether this which is called in the 8th sub-section an easement would be a common law easement or not. Probably it is, and for the purpose of this judgment I accept the proposition that it is an easement which could have been created at common law. The 4th sub-section shews that the land which is affected is to remain the property of the *Great Western Company*. I say it is not necessary to decide whether it is a common law easement or not, because it has been held that Parliament can create that which is not an easement known to the law at all. But for the

(1) 5 D. M. & G. 851.

C. A. 1882 GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO. Chitty, J.

purposes of this judgment I accept the proposition that this is an easement. But it is an easement on the face of it of a special character. It is an easement or right of using the land in perpetuity.

I turn to the *Lands Clauses Act* for the purpose of mentioning one or two sections. The 1st section enacts, "That this Act shall apply to every undertaking authorized by any Act which shall hereafter be passed and which shall authorize the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act, and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act and be construed together therewith as forming one Act." And by the 5th section, which relates to the form in which parts and portions of the general Act may be incorporated with the special Act, there is a provision towards the close that "thereupon all the clauses and provisions of this Act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such Act, form part of such Act, and such Act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such Act shall relate." The special Act is therefore a composite enactment, and framed in this way: certain special provisions are inserted therein, and as part of the Act the *Lands Clauses Act*, subject to the modification which I have mentioned, is incorporated with and forms part of it, and has to be construed with reference to the provisions of the special Act.

Now the principles of construction applicable to such an Act as this have been clearly laid down in the case of the *Metropolitan District Railway Company* v. *Sharpe* (1), which was originally a decision of Mr. Justice *Manisty*, whose decision was affirmed by the Court of Appeal, and the decision of the Court of Appeal was again affirmed in the House of Lords. The point there was whether the 34th section, with regard to the costs of an arbitration, applied

(1) 5 App. Cas. 425.

or not under these circumstances. There was a special mode of arbitration for the purpose of ascertaining certain compensation to be paid provided by the special Act, and the language of the 34th section did not fit in precisely with the wording of the special Act. All the Courts held that the 34th section must be read with such necessary modifications as made it applicable to the cost of the arbitration specially provided by the special Act, and Lord *Selborne* in his speech, addressing the House of Lords, said (1): "Now, my Lords, let us consider what would happen if you did not apply those clauses. If you did not apply the 34th section there would be in this case an unexplained departure from the universal principle, founded not upon any arbitrary policy but upon natural reason and justice, according to which the Legislature has been accustomed in Acts belonging to the class of which this is one, to provide that if compulsory powers are exercised against the owners of property for some object considered to be of sufficient importance to justify it, the costs either shall necessarily be, or at least in the judgment and discretion of some authority trusted by the Legislature may be, paid, so as to indemnify the person against whom those compulsory powers are exercised." And then he says (2): "Of course there can be no question that if the Legislature had not provided for costs in such a case, a Court of Justice could not do so; but in construing Acts of Parliament of this kind, and adjusting the general provisions of the general Act to the particular provisions of the special Act, considerations of reason and justice, and the universal analogy of such provisions in similar Acts of Parliament are proper to be borne in mind, and ought to have much weight and force."

I stay for one moment to apply those observations to the 16th section of the *Lands Clauses Act*. The substance of that section is to require in a case such as the present that before it should be lawful to put in force any powers of the Act or the special Act, or any Act incorporated therewith in relation to the compulsory taking of land for the purposes of the undertaking, the whole of the capital is to be subscribed. That appears to me to be a general principle of legislation with regard to this subject. As is well known, Parliament investigates the nature of the proposed

(1) 5 App. Cas. 432. (2) 5 App. Cas. 433.

C. A.
1882
In re GREAT WESTERN RAILWAY CO. *v.* SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.
Chitty, J.

undertaking and decides that it is a matter of public utility, and therefore confers on the promoters of the undertaking a power to take lands compulsorily, but this provision is intended to secure the landowner and the owner of property which is sought to be taken compulsorily. Parliament investigates the nature of the undertaking with a view to ascertain whether the capital is or is not sufficient for the purpose of purchasing and executing the works, and having decided that in the affirmative it permits the undertakers to put in force the compulsory powers which it confers upon them. The owner of the property is thus protected in two ways: first, there is a fund provided for the payment of the compensation to him for his property which may be so taken; and, secondly, he is not compelled to part with his land or his property until there has been subscribed a capital sufficient for executing the whole of the undertaking, otherwise his land might be taken where only a portion of the work could be executed. That appears to me to be a fair explanation of the general principle embodied in this 16th section.

Now applying the principles which I have thus shortly stated to the particular enactment before me, I have no hesitation in saying that I must read the term "lands" in the 16th section so as to make it applicable to the case before me. The Defendant company have the right of taking an easement or a right to use the *Great Western Company's* lands in perpetuity, and it seems to me that on the proper construction of the Acts of Parliament before me I ought to arrive at the conclusion, which I do, that the 16th section applies.

The Defendants, whose counsel argued the case most strenuously, found themselves under the necessity of pushing their argument to this extreme. They said that the 18th section of the General Act, which contains provisions as to the service of the notice to treat, did not apply for the same reason, because the term easement is not there. They themselves have served a notice to treat in the regular form with only the slight modification which was necessary, because they were taking an easement, or a right of perpetually using instead of taking the lands themselves. This it is said was unnecessary, and in effect that it was a mistake on the part of the Defendants. When they served the notice to

treat it is clear they thought the 18th section did apply, and it is satisfactory to a Judge to know that the construction which he adopts is the one which the parties themselves have adopted. Of course they are entitled to say when they come into Court that there has been a mistake from beginning to end. It was necessary in my opinion, on a true construction of these Acts, that they should serve as they did serve a notice to treat.

Then the argument is pushed further to this extreme. They say the provisions of the *Lands Clauses Act* with relation to the ascertainment of the compensation or purchase-money to be paid either by arbitration or by jury also do not apply. They found this argument upon the 9th sub-section of the 8th section. I do not propose to read that through, but I state my opinion, so far as it is necessary for this judgment, that the 9th sub-section only applies to the special matters which have been mentioned in the earlier part of the 8th section itself. The compensation or purchase-money is not one of the matters which is treated specially in that 8th section, and I entertain no doubt on the true construction of this Act that the Defendant company and the Plaintiff company are both entitled to say that the provisions of the *Lands Clauses Act* with reference to the ascertainment of the compensation or purchase-money and the manner in which it is to be ascertained apply.

The Defendants have hitherto adopted this construction. They obtained the appointment of a surveyor by the Board of Trade under the 85th section as amended by the later Acts, and the bond which they have given, as they have framed it, is, that if the Defendant company "shall pay or cause to be paid to the *Great Western Company* and deposit in the *Bank of England* for the benefit of the parties interested in the said lands as the case may require, under the provisions of the *Lands Clauses Act*, 1845, all such purchase-money and compensation as may in the manner in the said last mentioned Act provided be paid"; so, again, they have treated it on this point as if the purchase-money and compensation was to be ascertained under the *Lands Clauses Act*.

There was an argument addressed to me also with reference to the 85th section. It was said as a general proposition that

C. A. 1882 GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO. Chitty, J.

the 85th section applied to the taking of an easement. Now this proposition, as a general one, cannot be maintained for the reasons that I have stated, namely that the *Lands Clauses Consolidation Act* when incorporated simply into an Act authorizing the taking of lands does not authorize the purchasing of an easement. It is unnecessary for me to read through the 85th section, but I am satisfied that the words in that section taken by themselves do not authorize entering for the purpose of taking an easement. The words are appropriate to the taking of existing interests. The word "interest" occurs, and the word "convey" occurs, and so forth, and they are not appropriate to the taking of an easement to be created *de novo* out of land. The Defendants also found themselves bound to say that the provisions of the Act as to conveyance, the costs of conveyance, and the like, have no application. They are compelled to say that, because the term throughout the *Lands Clauses Act* is "lands."

There is one other argument on the part of the Defendants which it is right I should notice; it is founded on the 28th section of the special Act, which provides that "persons empowered by the *Lands Clauses Act* to sell and convey or release lands may if they think fit, subject to the provisions of these Acts and of this Act, grant to the company any easement, right, or privilege, not being an easement of water, required for the purposes of this Act, in, over, or affecting lands, and the provisions of the *Lands Clauses Acts* with respect to lands and rent-charges, so far as the same are applicable in this behalf, shall extend and apply to such grant, easements, rights and privileges as aforesaid, respectively."

It is said, that shews that such words as I have read towards the close of the 28th section were necessary in order to arrive at such a conclusion as I have arrived at, and that the insertion of those words in that clause shews that I ought not to make the modification which I have made in the 16th section of the *Lands Clauses Act*, which I consider to be the right one, because an express provision is here contained. The 28th section is only an enabling section, and the term at the commencement of it is "persons." Now, I agree that the *Great Western Company* were under the 8th sub-section of sect. 8 bound to sell or grant the easement in question, and of course therefore they were

C. A.
1882
GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.
Chitty, J.

authorized so to do, but I see no reason why the 28th section should not apply to the *Great Western Company* as well as to any other of the incapacitated owners, because the term at the commencement of the section is "persons," and the term "persons" includes corporations, except where the other provisions of the Act shew that "persons" must be read in the sense of a natural "person." The 7th section of the *Lands Clauses Act*, which contains a power for persons under disability to enter into contracts includes corporations. It seems to me, therefore, that I should read the term "persons" here as including corporations. The result is that this is an additional clause enacting that the provisions of the *Lands Clauses Act* so far as the same are applicable are to apply to such grants of easements as are mentioned in the section. So far from the 28th section affording any ground of defence to the Defendants, it seems to me, on the contrary, to strengthen the case of the Plaintiffs.

For these reasons, I think that the Plaintiff company are right, and that they are entitled to the injunction which is asked.

G. M.

C. A.

The Defendants appealed, and the appeal was heard on the 20th and 21st of December, 1882.

Pope, Q.C., *Ince*, Q.C., and *Upjohn*, for the Appellants:—

If it is held by this Court that sect. 16 of the *Lands Clauses Act*, 1845, applies in the way contended for by the Plaintiffs, it will furnish companies with a most powerful engine for preventing competition. The section is in practice obsolete, for although in 1845 Parliament required a deposit and a subscription contract, a new machinery was substituted in 1857, the Standing Orders having been altered.

[JESSEL, M.R.:—There is force in your remarks, but we cannot treat a section which was incorporated in an Act of last year, as obsolete.]

At all events, its practically obsolete character is a reason for construing it very strictly. Sect. 8 contains provisions for the protection of the *Great Western Company*. Sub-sect. 2 contains

C. A. 1882 — GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.

special provisions for our crossing their line by means of a bridge and a tunnel, and sub-sect. 8 provides that we shall not interfere with their property in any other way. This comes in effect to an agreement that we shall have what I may call an easement of crossing this line in a particular way, and sub-sect. 9 provides arbitration as a means of ascertaining the compensation. We say then first, that this taking an easement is not a taking of land within sect. 16; and, secondly, that it is not a compulsory taking of anything, but an agreed taking by virtue of the agreement embodied in clause 8. It has been held repeatedly that a new easement cannot be taken compulsorily. According to the interpretation clause in the *Lands Clauses Consolidation Act*, "lands" extend to "messuages, lands, tenements, and hereditaments of any tenure." A new easement is not the subject of tenure and cannot be included; and in sect. 16, the word must receive the same construction.

[COTTON, L.J.:—The question is whether we must not read the *Lands Clauses Act* and the special Act together, and hold that sect. 16 prohibits any purchase *in invitum* till the capital has been subscribed.]

That might have been so, if the section had prohibited the exercise of any compulsory powers, but it only prohibits the exercise of powers in relation to the compulsory taking of land.

Romer, Q.C., and *R. S. Wright*, *contrà*:—

In August, 1882, the Defendants served us with a notice to treat modified according to the special circumstances of the case, they not being entitled to take the land but only an easement. This was a notice to treat under sect. 18 of the *Lands Clauses Act*, and would place us under the liability of paying costs of the inquiry before a jury if we claimed too much.

[JESSEL, M.R.:—I do not think that you could go before a jury. The special Act seems to require the price to be fixed by arbitration.]

They then proceed under sect. 85 of the *Lands Clauses Act*; and they are in a difficulty as to proceeding under it if "land" has the limited meaning for which they contend. The intention

of sect. 16 of the *Lands Clauses Act* was to prevent landowners from being compelled to part with their land when there was no guarantee that the works for which it was taken would ever be completed. It would lead to a whimsical result if sect. 16 is construed as the Defendants contend; any landowner whose land is authorized to be taken could stop them, but we should have no power to prevent our property from being interfered with.

[JESSEL, M.R.:—I do not see how you would be injured. You would be paid, and substantially nothing would be taken from you.]

The Court will not readily infer a distinction between a railway company and any other landowner. The contention is that a section avowedly introduced for our protection takes away a right which we would otherwise have had under the *Lands Clauses Act*.

[JESSEL, M.R.:—I see nothing unreasonable in that. The clause prevents their taking more than an easement, and the Legislature might well consider that a company did not require the same protection against the acquisition of an easement like this, which in no way interferes with the use of their property, as a landowner requires against having his land taken.]

Now as to the mode in which the *Lands Clauses Act* and the special Act are to be construed together the concluding words of sect. 5 of the *Lands Clauses Act* are material.

[JESSEL, M.R.:—In my opinion that section has no bearing on the present case, it was intended only to enable the incorporation of portions of the Act by reference to the headings of the groups of sections.]

There are two cases in which questions have arisen as to construing the general Act as incorporated with the special Act. In *Metropolitan District Railway Company* v. *Sharpe* (1) the special Act had provisions for ascertaining certain compensations by arbitration; and it was held that the costs of the arbitration were determined by the arbitration clause in the *Lands Clauses Act*, though it was strongly contended by the company that "such arbitrations as aforesaid" referred only to arbitrations under the *Lands Clauses*

(1) 5 App. Cas. 425.

C. A. 1882 GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.

Act and not under the special Act. So, if in the present case the Act did not authorize the acquisition of easements, sect. 16 would only apply to land, but as the acquisition of easements is authorized the section will be held to apply to them. In *Hill* v. *Midland Railway Company* (1) the company had power to purchase compulsorily an easement of tunnelling and wished to proceed under sect. 85. They were met by the objection that the section only applies to land, but it was held that where the Act authorizes the taking an easement the word "lands" will be held to include easements, and that the company can make a deposit and enter on the land under sect. 85 for the purpose of acquiring the easement. Mr. Justice *Fry* considered that sect. 85 when incorporated in an Act authorizing the taking easements included the case of easements.

[JESSEL, M.R.:—I should have come to the same conclusion, I think that the case is within the words. The land is required to be "permanently used."]

Now as to the enactments in the present case, if sect. 5 of the special Act stood alone, the Defendant company would have had power to acquire the fee simple, but sect. 8 is inserted for the protection of the *Great Western Company*, and sub-sect. 8 prevents their taking anything more than the easement there mentioned. This amounts to taking the lands and using them and holding them in a particular way.

[JESSEL, M.R.:—I do not agree with your view of sect. 5, for the power is given "subject to the provisions of this Act." As then you find other sections preventing the taking the land of the *Great Western Company* sect. 5 does not help you.]

The *Swindon Company* are in substance taking our land, for they are entering on it and making a tunnel.

[JESSEL, M.R.:—Taking it in the sense of physical interference with it but not in the sense of purchasing.]

Then it is contended that this is a case of purchasing by agreement, but there is no agreement in the case. The Act only provides that if the *Swindon Company* requires the easement we shall

(1) 21 Ch. D. 143.

be compelled to sell it, and their taking it is putting in force compulsory powers for the taking of land. The Court will lean in our favour; we ought not to stand in a different position from any other landowner.

[JESSEL, M.R.:—I do not think that a railway company is in the position of an ordinary landowner. It is the owner of a highway, and crossing that highway by an arch in such a manner as not to interfere with the use of the highway is a very different thing from crossing the land of an ordinary landowner.]

Sub-sect. 9 cannot have the effect which the Appellants attribute to it. It refers to disputes about "the matters and provisions aforesaid," and there is nothing about compensation in the previous part of the section. Sub-sect. 9 cannot, therefore, have been intended to oust all the machinery of the *Lands Clauses Act* as to the mode of assessing compensation.

[BOWEN, L.J.:—It appears much better that compensation should be ascertained by arbitration than by the verdict of a jury in such a case as this. Disputes might arise as to the mode in which the crossing should be effected, and until they were settled, which must be by arbitration, the compensation could not be ascertained.]

The *Swindon Company* were bound to give us plans, and the mode in which they are to be sanctioned is provided for, so the suggested difficulty of a jury assessing compensation does not arise.

[JESSEL, M.R.:—I think that the question of compensation for the crossing a line of railway by an arch or tunnel is much better determined by arbitration than in any other way, and it lies on you to shew that it is not within sub-sect. 9. A jury can assess the value of a piece of land very well, but not the value of such an easement as this.]

It cannot have been intended to sweep away all the compensation clauses in the *Lands Clauses Act*, which is incorporated with the special Act in the present case.

[JESSEL, M.R.:—By sect. 3 of the special Act words in it are to have the same meaning as in the incorporated Acts unless

C. A. 1882 GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.

there be something in the subject or context repugnant thereto. Now "lands" in the *Lands Clauses Act* does not include an easement, and you have to shew that to avoid repugnancy it must include an easement here.]

We say that sect. 8 was intended to vary the rights of the parties by enabling the *Swindon Company* only to take an easement over our land instead of the land itself, and in other respects to leave the rights unaltered. Sect. 24 of the special Act helps us, for if "land" does not include this right the *Swindon Company* can purchase after any number of years. This cannot have been the intention of the Legislature. Sect. 28 shews the intention to make the provisions of the *Lands Clauses Act* as incorporated apply to easements.

Then in some of the clauses of the *Lands Clauses Act* as incorporated it is necessary to give to the word "lands" the wider meaning. Sect. 18 provides for notice to treat; if that does not apply the *Swindon Company* may take this easement without giving us any notice.

[JESSEL, M.R.:—If they are to acquire anything by purchase from you, they must give you a reasonable notice; it does not follow that they must give you a notice to treat under the *Lands Clauses Act*, and I do not think that they need do so.]

Then if the effect of sect. 8, sub-sect. 9, of the special Act is to oblige us to proceed by arbitration under that clause, the effect is that the *Great Western Company* are deprived of the benefit of sect. 34 of the *Lands Clauses Act* as to the costs of arbitration. The *Swindon Company* are proceeding under sects. 84 and 85 of the *Lands Clauses Act*, and doing what amounts to an exercise of their compulsory powers of purchasing land, for by the Act they are to purchase this land though only in a particular way. They ought then to be restrained by reason of sect. 16.

Ince, in reply.

JESSEL, M.R.:—

The question before us, which depends upon the construction of the *Lands Clauses Act* and the special Act, is this, whether

what, in my opinion, amounts merely in substance to acquiring running powers, preceded by an obligation to construct the archway and tunnel over which the running powers are to be exercised, is a compulsory taking of lands within the terms of the *Lands Clauses Act*, so as to make the 16th section of that Act apply.

In the first place, we must not forget that the *Lands Clauses Act* has a definition extending the ordinary meaning of the word "lands." That such a privilege or right as I have mentioned of running trains over land (I purposely abstain from calling it an easement) is not land, is clear. Is it then land within the meaning of the 3rd section of the *Lands Clauses Act*, which says that "the word 'lands' shall extend to messuages, lands, tenements, and hereditaments of any tenure?" In the absence of decision there might be a question whether the word "hereditaments" would not include such a right. It is not a tenement, for I do not conceive that any kind of running power could be the subject of tenure, but the word "hereditament" might be held to apply to it. When, however, we consider the object of the statute, I think no one can doubt that the decisions are right which lay down that it was never intended to compel a landowner to carve a new easement out of his land and sell it to the company against his will. The result, therefore, is that the word "lands" in the *Lands Clauses Act* does not include any incorporeal easements except such as are attached to the lands which are the subject of purchase.

Then the 16th section, which is preceded by a heading, "and with respect to the purchase and taking of the lands otherwise than by agreement, be it enacted as follows," provides that where the undertaking is to be carried into effect by means of a capital to be subscribed by the promoters, the whole of the capital shall be subscribed in manner therein provided, "before it shall he lawful to put in force any of the powers of this or the special Act, or any Act incorporated therewith, in relation to the compulsory taking of land for the purposes of the undertaking." In the case before us the capital is not subscribed. I purposely refrain from saying anything about the practice of Parliament or the practice of some great railway companies, because I think it is our duty to decide simply according to the law without having

C. A. 1882

GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.

Jessel, M.R.

any regard either to the motives of the parties or any attempt on either part to take advantage of any accidental slip or mistake on the other side.

Is then what the Defendant company is claiming a right to do a taking of land for the purposes of the undertaking? It is clear that under the *Lands Clauses Act* standing alone it is not, and upon that point I do not think that there is any difference of opinion. But the *Lands Clauses Act* is incorporated in the special Act, and the real question is whether when it is incorporated into a special Act, which gives the railway company incorporated by that special Act a power of taking a right of this kind over land, this section is to be extended so as to prevent their acquiring that right? In other words, whether when the *Lands Clauses Act* is incorporated in such an Act, the word "lands" is to have an extended meaning given to it which it had not in the original Act, because in the original Act there was no authority to take the easement rights, whereas now there is an authority to take such a right, and the word "hereditament" may be taken to include such a right.

In trying that question we must first of all see what the incorporation means. As I read the incorporation clause, sect. 1 of the *Lands Clauses Act*, the effect of the incorporation is pretty much equivalent to repeating the clauses of the *Lands Clauses Act* in the special Act. "This Act shall apply to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall form part of such Act and be construed together therewith as forming one Act."

Now in the special Act we have something in addition to that, and something which to my mind is very important. The 2nd section of the Act incorporates the *Lands Clauses Acts* with the special Act, except where expressly varied by the special Act. Sect. 3 enacts that, "In this Act the several words and expres-

sions to which meanings are assigned by the Acts wholly or partially incorporated herewith have the same respective meanings, unless there be something in the subject or context repugnant to such construction." The result, therefore, is that by the incorporation of the *Lands Clauses Act* all the definitions of the *Lands Clauses Act* are inserted, and the same sense is to be attributed to the words that they bear in the *Lands Clauses Act* itself unless there is something repugnant to their bearing it. Then we come to what really is the substance of the whole matter. Clause 5 enacts that "subject to the provisions of this Act" the company may take any of the lands in the plans and books of reference. This clause being preceded by the words "subject to the provisions of this Act," and there being, as I shall shew presently, negative words as regards the lands of the *Great Western Company*, the argument that this clause empowers the *Swindon Company* to take any lands of the *Great Western Company*, fails. Then sect. 8, which is the section for the protection of the *Great Western Railway Company*, has the following provisions. In the first place it provides that the *Swindon Company* shall not enter upon or interfere with the *Great Western Railway* or any of the lands or works of the *Great Western Company*, or execute any works whatever under, over, or affecting the same, until the plans have been approved of in the way there mentioned, and the works are to be constructed to the satisfaction of the engineer of the *Great Western Company*, or of an engineer appointed by the Board of Trade. The result of that section is this, that the *Swindon Company* are not to take the lands at all, they are only to enter and construct works of a given class. Sub-sect. 2 gives certain other advantages to the *Great Western Company* which I need not mention, and sub-sect. 3 makes certain provisions to prevent dangers and obstructions which I need not read; but sub-sect. 4 is important. I ought to mention that the *Swindon Company* is to cross the *Great Western* line twice, once by an archway over the *Great Western Railway*, and the other time by a tunnel under it. Sub-sect. 4 provides that "the archway or bridge, and any extensions thereof constructed by the company, and the incidental works connected therewith for carrying Railway No. 1 under the main line to *Gloucester* of the *Great*

C. A. 1882 — GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO. — Jessel, M.R.

Western Railway, shall, from and after the completion, and subject as without prejudice to the duty and obligation of the company for ever thereafter at their own expense to uphold and maintain the re in good and sufficient repair, and otherwise in respect thereof, the property of the *Great Western Company*, and be deemed p of the structure of their said main line to *Gloucester*." The res of that is that the *Great Western* retain their property in the lan and acquire property in the works which are placed on the land, king the whole thing part of the main line of the *Great Western ilway Company*. They never part with any property whatever. pass over sub-sects 5, 6, and 7, which I do not think material nd come to sub-sect. 8: "Except for the purposes of the crossing of Railway No. 1, and for the junction of Railway No. 3 with the in line to *Bristol* of the *Great Western Railway*, the company shall t take or acquire any rights over any land of the *Great Western ompany*" (they had not got them before, and this is only put in *ex abundanti cautelâ*), "and save as aforesaid nothing in this A contained shall extend to authorize or enable the company to ta e or enter upon or use, either temporarily or permanently, any of he lands of the *Great Western Company*, or to alter, vary, or interi re with the railways, or either of them, of that company, or wi h any of the works thereof, further or otherwise than is necessai v for the construction and maintenance of the railways by this Act authorized, without the consent in writing in every instance or that purpose first had and obtained of the *Great Western Compa y* under their common seal." Then comes this, "And with respec t to any lands of the *Great Western Company* which the company are by this Act from time to time authorized to use, enter upon, or interfere with, the company shall not purchase and take the same, but the company may purchase and take, and the *Great Western Company* shall sell or grant accordingly, an easement or right of using the same in perpetuity for the purposes for which but for this enactment the company might purchase and take the same." In other words the *Swindon Company* has a right to buy, and the *Great Western Company* are compelled to sell, the right of permanently using a part of the *Great Western Company's* railway by running trains over it. If the

Act had said in so many words that the company might purchase and the *Great Western Company* should grant running powers over the railway it would exactly have expressed the real meaning. What is the legal effect of selling such running powers I will consider presently. The 9th sub-section is very important. "If any dispute shall arise between the *Great Western Company* and the company respecting the matters and provisions aforesaid, or any of them, such dispute shall be settled by an arbitrator to be agreed upon between the parties, or in case of difference to be appointed on the application of either party by the president for the time being of the Institution of Civil Engineers in *London*, the costs of such arbitration to be in the discretion of such arbitrator." It was said that this was not intended to exclude the provisions of the *Lands Clauses Act* as to the mode of assessing compensation. But sub-sect. 9 expressly refers to a dispute "respecting the matters and provisions aforesaid, or any of them," and surely when one company is authorized to buy, and the other company is authorized to sell, and there is a dispute as to the price, that is a dispute respecting one of the matters aforesaid. I should have thought such a point incapable of argument. It is perfectly plain that sub-sect. 9 covers any dispute which can occur respecting the matters before-mentioned, and provides for its being settled by arbitration. Look at the nature of the case. The *Swindon Company* are to be at the expense of making the line across the railway of the *Great Western Company*, and are to have the right of running trains over it. Is the compensation payable for such a right a question that either of the companies ever thought of sending to a jury? I should say certainly not. This clause, in my opinion, carries out what I believe both parties meant, and when the *Great Western Company* talk of being deprived of the right of going before a jury, it is my opinion they never had, or dreamt that they had, such a right. The intention of both parties was that the question should be referred to arbitration. Arbitration is a far better method of deciding such a question than a trial by jury.

There is only one other section which is of importance. The 24th section was referred to, but I think it has no bearing on the matter. The 28th section is material, because it was contended

C. A. 1882 GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO. Jessel, M.R.

that there was no limit to it in point of time. There is however a limit imposed by the 31st section which puts an end to the powers of the company at the end of five years except as to so much of the railway as is completed within that time. The 28th section is, "Persons empowered by the *Lands Clauses Acts* to sell and convey or release lands may if they think fit, subject to the provisions of those Acts and of this Act, grant to the company any easement, right, or privilege, not being an easement of water, required for the purposes of this Act in, over, or affecting lands, and the provisions of the *Lands Clauses Act* with respect to lands and rent-charges, as far as the same are applicable in this behalf, shall extend and apply to such grant, easements, rights, and privileges as aforesaid respectively." Now, in the first place, this does not apply to the *Great Western Company*. They are not persons who may if they think fit grant the easement. In the next place, it only applies to people who have the power of granting an easement, who I suppose as a general rule are owners in fee simple. In the third place, so far as it affords any argument at all, it affords an argument, though but a feeble one, against the Plaintiffs, which is this, that if the word "lands" in the *Lands Clauses Act* would, without any extension, have applied to easements, the enactment that the provisions of the *Lands Clauses Act* with respect to land should extend and apply to acquiring easements would have been unnecessary.

Is then this case within the 16th section? In my opinion it clearly is not. The *Swindon Company* are not compulsorily taking land. There are two questions as to that, first of all does a prohibition of the compulsory taking of land prohibit every compulsory taking of land by the company? Does it prohibit anything but the compulsory taking of land of which the Act has been speaking? It is not necessary to decide that question, but I think that it does not. Suppose, for instance, that the company had a power to take land under another private Act of Parliament with which the *Lands Clauses Act* was not incorporated. I do not think that the section would apply to such a taking. I think it is intended only to limit that right to take land compulsorily which was conferred by the pre-

ceding sections. But it is not necessary to decide that, because in my opinion this is not a compulsory taking of land at all. The *Swindon Company* is prohibited from taking the land. The property never goes out of the *Great Western Company*. All that the *Swindon Company* can do is to enter upon the land for the purpose of constructing the works, and all they can get from the *Great Western Company* is a right of running their trains over it. Is the acquiring a right of that kind, whether you call it an easement or an hereditament, a compulsory taking of land? I think that it is not, and that the reasons for applying the 16th section of the *Lands Clauses Act* do not apply to the case. I think that the section is intended to secure an ordinary landowner from having his lands taken from him when there is no security for the railway being completed. Now the *Great Western Company* do not want that security. Any dispute that they raise can be referred to arbitration. If they say that the *Swindon Company* have not got capital enough and cannot make their line at all, they could raise that dispute and send it to the arbitrator. They do not require the protection of sect. 16, for they have a very formidable series of clauses giving them very effective protection. I think, therefore, that the *Great Western Company* are not entitled to ask us to extend the meaning of the words of sect. 16, not forgetting the 3rd section of the special Act, and to say that the body which simply takes the grant of this peculiar right—I do not choose to call it an easement—is taking land within the meaning of sect. 16.

Now with regard to the 84th and 85th sections, my present opinion is that they do not apply to the case, but it is not necessary to decide the question, for the *Swindon Company* have given the bond, and have not asked to withdraw it. If the sections apply, they have complied with them, but I do not think that their compliance with sect. 85, any more than the form of their notice to treat, can help the *Great Western Company*. I am not satisfied that the provisions of the 84th and 85th sections apply to this case, but if they do, that cannot affect the construction of the other sections. If they are read to apply to this case, it can only be on the ground that the words "permanently used" apply to such a user as this. Therefore they would not apply to the

C. A. 1882 GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.

construction of the 16th section which relates to the compulsory taking of land, and this, as we have decided in a previous case, means the acquiring by purchase, and not the mere taking possession. For the reasons I have given I am of opinion that the judgment of the Court below must be reversed.

COTTON, L.J. :—

In this case the *Great Western Railway Company* ask the interference of the Court to restrain the *Swindon and Cheltenham Extension Railway Company* from interfering with the lands on which the *Great Western Railway* is constructed, upon this ground, that at the present moment, having regard to the provisions of the Act of Parliament under which the Defendants are acting, they are not in a position to say that they can exercise their parliamentary powers of taking this land. If they have no parliamentary power they are trespassers, and have no right to be there. The question turns upon the 16th section of the *Lands Clauses Act*, which is incorporated in the special Act. I shall not refer to anything that has been done by the Defendants under the advice of those who advised them as to the steps which they ought to take, for we have to decide according to our view of the law, not according to the view taken of it by the parties. Nor do I consider the fact that the Plaintiffs are a railway company to be in any way to their prejudice. I should rather be inclined to consider it as being in their favour, because a railway company has the greatest possible interest in seeing that its works are not interfered with except by bodies which are in a position to complete the works for the purpose of which their Act authorizes them to interfere with the property of others. I put that, however, out of the question, and merely look upon the railway company as persons having land, and asking the Court to prevent somebody from interfering with that land under colour of Acts of Parliament which do not authorize its being so interfered with. In my opinion the 16th section of the *Lands Clauses Act* prohibits such interference in the present case. It enacts that the whole capital shall be subscribed before it is lawful to put in force any of the powers of that Act or the special Act "in relation to the compulsory taking of land for the purposes of the undertaking." The

question is whether here the Defendant company are putting in force powers in relation to the compulsory taking of land for the purposes of the undertaking. It has been suggested that this section does not apply because it only applies to the taking of land otherwise than by agreement. It is urged that the special Act in the present case embodies an agreement between the two companies that the land was to be taken, and that this must be regarded as a taking of land by agreement. In my opinion that cannot be maintained, for under sect. 8 of the Defendants' Act, to which I shall presently refer, there is a parliamentary authority for the *Swindon Company* to take, and if they do so, a compulsion on the *Great Western Company* to grant, which clearly shews a compulsory taking independently of agreement.

In the first place to the exercise of what powers does sect. 16 refer. It is suggested that it refers only to the exercise of the powers given by the clauses of the *Lands Clauses Act* incorporated by the special Act. That cannot be so, for the words are "Before it shall be lawful to put in force any of the powers of this or the special Act, or any Act incorporated therewith in relation to the compulsory taking of land for the purposes of the undertaking." Therefore it must apply to all powers relating to the compulsory taking of land, whether they are given specially by the *Lands Clauses Act*, or whether they are given specially, or only by reference in the special Act, and in my opinion this section is not confined to cases where the land is to be purchased. It applies to the case of permanently taking the land for the purposes of the undertaking, if it can be so taken without purchasing it, the temporary occupation and taking of land being provided for by other sections. It also, in my opinion, applies to any act done as one of the steps in the compulsory taking of land.

The questions which we have to consider are, Is this land, and can the Defendants be said to be taking the land? Undoubtedly it has been held by the Court of Appeal that where the *Lands Clauses Act* is incorporated into another Act, then if you find nothing to the contrary in the context of the Act, "land" does not include an easement, but merely includes that which comes within the description of land in the interpretation clause of the

C. A.
1882
GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.
Cotton, L.J.

Lands Clauses Act, which says that "land" is to include messuages, lands, tenements, and hereditaments of any tenure. The leading case on this point is *Pinchin* v. *London and Blackwall Railway Company* (1), where the Lord Chancellor, in answer to the argument that an easement was an hereditament, says (2), "But the interpretation clause only says that this is to be the construction, if there is nothing in the context which is inconsistent with it; and, looking at the whole context my impression originally was, and it has not been removed, that an hereditament there means a corporeal hereditament, an hereditament which may be the subject of tenure, which a right of way cannot be. It therefore appears to me that a right of way is not an hereditament within the meaning of the Act. There is also another reason which I will mention. I think it was not the meaning of the Legislature to enable companies to take from a man a right of way through his property." In that case the Lord Chancellor held that on the context "hereditament" did not include an incorporeal hereditament, giving as one of his reasons that on the fair construction of the Act with which he had to deal, Parliament had not authorized an easement to be taken from the landowner. Here we have to deal with a different state of things. We have a special Act with which the *Lands Clauses Act* is incorporated, but by which express power is given to the company to take not the land, but what is called an easement or right of using the land in perpetuity, and that being so the argument of Lord *Cottenham* goes the other way. His argument was that hereditaments did not include incorporeal hereditaments, because looking at the whole context of the Act it was clearly intended to allow the promoters to take only corporeal hereditaments, and not to take an incorporeal right over them. Here the *Swindon Company* is expressly authorized to take an easement, and in my opinion in construing the section as incorporated into this Act we ought to consider "land" to include an easement.

Then it is said that the Defendants are not taking or claiming to take land, because the land is still to remain the property of the *Great Western Company*, and in some marvellous way the line which is to be put over it is to be considered as part of

(1) 5 D. M. & G. 851. (2) 5 D. M. & G. 862.

the *Great Western Railway*. But in all cases of easement, the land over which the easement is to take effect remains the property of the owner of the servient tenement. Here the Act says that the Defendant company shall not take and purchase the land, "but the company may purchase and take, and the *Great Western Company* shall sell or grant accordingly an easement or right of using the same in perpetuity for the purpose for which but for this enactment the company might purchase and take the same." Parliament thus has given the right of purchasing an easement, not indeed an ordinary easement, but what may be called a statutory easement—a right of using the lands in perpetuity. I think it is to be considered a hereditament, and looking to the interpretation clause I think that taking this right is a taking of land within the meaning of the 16th section of the *Lands Clauses Act*. I can see no reason why we should give to this general enactment, intended to prevent railway companies from taking lands when they have not the means of carrying out their undertakings, a limited meaning, rather than the more extended meaning which, in my opinion, is the true meaning. I think therefore that Mr. Justice *Chitty* was right in interfering.

It was said that sect. 3 of the special Act is inconsistent with this view. Now sect. 3 says, "In this Act the several words and expressions to which meanings are assigned by the Acts wholly or partially incorporated herewith, have the same respective meanings, unless there be something in the subject or context repugnant to such construction." Now "land" in the *Lands Clauses Act* includes hereditaments. There is, in my opinion, nothing in the Act inconsistent with giving that meaning to it here. In another Act in which it, the *Lands Clauses Act*, was incorporated, it was held to be confined to corporeal hereditaments, but only for the reasons I have mentioned. It is not as if the *Lands Clauses Act* had said in terms, "lands shall not include incorporeal hereditaments." If it had done so I agree that the 3rd section of the special Act would have caused a difficulty, but the *Lands Clauses Act* only said that "lands" should include hereditaments, which *primâ facie* would include easements, unless there was something in the context to shew that that was not the meaning. Here

C. A. 1882 GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO. Cotton, L.J.

there is nothing in the context to shew that that is not the meaning, and there is, in my opinion, something to shew that it is the meaning.

I must now mention sect. 8, sub-sect. 9 of the special Act. If a dispute about the purchase-money could not have been settled under it, that would very much have strengthened the conclusion at which I have arrived, because it would have been said—how can this dispute be settled unless the provisions in the *Lands Clauses Act* relating to the settling of the amount of compensation for lands taken for the purposes of the Act are applicable? Now I do not say that sub-sect. 9 does not—it may and probably does—afford the means of settling the amount of compensation; but in my opinion the fact that means other than those given by the *Lands Clauses Act* for settling a dispute as to the price have been provided, does not prevent us from giving to sect. 16 what, in my opinion, is its fair and true meaning.

As regards sect. 28 of the special Act, I in no way rely upon it, but I think the argument that it was put in *ex abundanti cautelâ* is feeble, and does not afford any sufficient reason for giving to the word "land" in sect. 16 of the *Lands Clauses Act* of 1845, when incorporated into this Act, the restricted meaning for which the Appellants contend. I am of opinion, therefore, that Mr. Justice *Chitty* came to the right conclusion.

BOWEN, L.J.:—

In this case the real question seems to me to be whether the action of the *Swindon Company* is a compulsory taking of land within the meaning of sect. 16 of the *Lands Clauses Act* of 1845, by which it is provided that the capital must be subscribed before it shall be lawful to put in force any of the powers of that Act or the special Act, or any Act incorporated therewith, in relation to the compulsory taking of land for the purposes of the undertaking. We have then to consider whether what the *Swindon Company* desire to do amounts to a compulsory taking of lands within the meaning of that provision. Now, first of all, what is it that the company are proposing to do. When the scheme of the *Swindon Company* was brought before Parliament in 1881, it was opposed by the *Great Western Company*, and in the result an Act was

passed which enabled the *Swindon Company* for the purpose of carrying out its undertaking to do certain definite things. It obtained, of course, the general power of taking land from landowners when required for the purposes of the undertaking. But, with regard to the *Great Western Company*, power of taking their land was not, in so many words, given to the *Swindon Company*, but the power was given of entering upon *Great Western* land at certain points for the purpose of constructing a bridge over and a tunnel under the *Great Western* line, and when the *Swindon Company* had constructed that bridge and tunnel they were not to become the owners of them, they were to have no property in the soil, but were to have the powers of permanently using the bridge and tunnel for the purposes of their undertaking. Is, then, that right of permanent user "land" or "hereditaments" within the meaning of the interpretation clause of the *Lands Clauses Act*, and is the insisting upon and acquiring that right under sect. 8, sub-sect. 8, of the Special Act, a compulsory taking of land?

First of all, what is the nature of this right? It has been much discussed whether it is an easement. It is called an easement in the section, and for certain purposes it may be called an easement. But if it were an easement in the true sense of the term, that would not bring it within the interpretation clause of the *Lands Clauses Act*, because it has been decided that a newly created easement is not "land" or "hereditaments of any tenure" within the meaning of that section. It has been urged, indeed, that it is a hereditament. It seems to me that it would be a barren controversy to discuss the question whether a right created by Act of Parliament for the purposes of a particular corporation, and vested in that corporation only, is in the abstract a hereditament. I think if one were to read the *Lands Clauses Act* by itself, and ask whether a statutory right of that kind can be said to come within the description of land or hereditament of any tenure, the answer would be *primâ facie* in the negative. It is not land, because the special Act which creates the right expressly says that those who take it are not to take the lands. Is it a hereditament of any tenure? *Primâ facie*, I think the answer would be it is not, for it is not connected with any tenure at all. I

C. A. 1882 GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO. Bowen, L.J.

agree, however, that if on reading the special Act and the *Lands Clauses Act* together it appeared that this special statutory right, although not *primâ facie* a hereditament or land, was treated as such in the special Act, and meant to be so treated for the purposes of the *Lands Clauses Act*, we should be obliged to treat it as coming within the meaning of the word "land" or "hereditament" in clause 16. It seems to me that the strength of the argument for the Respondents would be enormous if they could shew that the acquisition of this right by the *Swindon Company* could not be effected without resorting to the machinery created by the *Lands Clauses Act* for the compulsory taking of land. We have then to consider whether the special Act provides any machinery for the acquisition of this so-called easement without resorting to the machinery of the *Lands Clauses Act*.

Now, it appears to me that the true interpretation of the Act coincides with what we must suppose to have been the intention of the persons acting on behalf of the two companies. The *Swindon Company* wished to have powers of crossing the line of the *Great Western Company*. When the advisers of the two companies, their engineers, and surveyors, and solicitors met in the committee room of the House of Lords, can anybody suppose that they would deliberately choose the machinery of the *Lands Clauses Act* for ascertaining the compensation to be paid for crossing the line of the *Great Western Company* in the way proposed, instead of having it referred to arbitration? Would either company wish that the compensation to be paid for such an interference with the line of the *Great Western Company* should be assessed by a jury? If such a thing had been proposed to the engineers or the surveyors, or to the solicitors of the two companies, in my opinion they would have rejected it on the spot, and would have said, No, let us have an arbitration. Upon looking upon the Act, that is what I find there provided. This seems to me to answer Mr. *Romer's* argument, for not only is there a machinery provided which is as good as the *Lands Clauses* machinery, and which therefore dispenses with the necessity of invoking the powers of the *Lands Clauses Act* for this purpose; but a machinery which for this purpose is far better, and, as I believe, far more consonant with the intention of the parties. That gets rid of the argument

founded on the *Metropolitan District Railway Company* v. *Sharpe* (1). There the question was whether the provisions of the *Lands Clauses Act* with regard to costs had been inferentially repealed by the special Act, or whether, although the special Act substituted special arbitration machinery for the arbitration machinery provided by the *Lands Clauses Act*, nevertheless the provision of the *Lands Clauses Act* as to costs was kept alive. The House of Lords held that the Legislature could not be supposed to have intended to repeal the only existing rule as to costs and leave arbitrations under the special Act without any provision as to costs. I do not think that they did any great violence to the words in coming to that conclusion, but be that as it may, they yielded on a question of construction to an argument founded on the extreme inconvenience of the contrary construction. If there was the same sort of inconvenience here, the same reasoning might apply, but if you find in the special Act a more convenient machinery than in the *Lands Clauses Act*, then no such argument applies.

Now let us look more particularly at the special Act. In the first place the *Lands Clauses Act* is incorporated, and the meaning which the *Lands Clauses Act* attributes to words is incorporated also. Then sect. 5 empowers the *Swindon Company* to take any of the land on the deposited plans, which would include parts of the *Great Western Company's* land were it not for the words "subject to the provisions of this Act." These words oblige us to look on, and when we come to sect. 8 we find that the lands of the *Great Western Company* are not intended to be taken in the ordinary way in which lands are to be taken under the *Lands Clauses Act*. In the first place, in the case of the ordinary landowner a notice to treat must be served, but here, under sect. 8, the *Swindon Company* may enter the *Great Western Company's* works, when plans of the works have been approved by the engineer of the *Great Western Company*, or, on his default, by an engineer appointed by the Board of Trade. Then we find a provision that these particular works, when constructed, are not to be the property of the *Swindon Company* but of the *Great Western Company*, and finally sub-

(1) 5 App. Cas. 425.

C. A. 1882

GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO.

Bowen, L.J.

sect. 8 expressly says that what the *Swindon Company* are to take is not to be the land, but a right, which is there strictly defined, to use the land. Then we have an arbitration clause (sub-sect. 9) which provides machinery sufficient for the adjustment of any possible dispute between these two companies. I have listened in vain for the suggestion of any dispute which cannot be disposed of under sub-sect. 9. The question of costs was suggested, but that is provided for by the enactment that the costs of the arbitration are to be in the discretion of the arbitrator. It was urged that this deprives the *Great Western Company* of the advantage they would otherwise have under the *Lands Clauses Act*, which provides that the costs of the inquiry as to compensation are to be borne by the company which takes the land. There is a fallacy in this argument. In the first place, if this right is not land, they are not deprived of anything, for the *Lands Clauses Act* does not apply, and they never had the advantage they mention. But if it were a question of deprivation, I still should think that the provision giving the arbitrator power over the costs was reasonable and convenient.

Then I think it was suggested there might be a dispute about the entry on the land which would not be dealt with by arbitration. If that be so, the *Great Western Company* are amply protected, because they can hold the *Swindon Company* at arm's length until their wishes are complied with. If such a dispute is provided for by the section, *cadit quæstio.*

I agree with the Master of the Rolls and Lord Justice *Cotton* in abstaining from pronouncing any opinion about sects. 84 and 85 of the *Lands Clauses Act.* I am not sure that the *Great Western Company* have in this case anything to do with them. If those two sections are germane to the matter in hand between the two companies, still I do not think that the discussion of them can throw any light on the question whether the taking of this particular right is the compulsory taking of land within the 16th section of the *Lands Clauses Act.*

The Respondents referred to the provision that "nothing in this Act shall extend to prejudice, diminish, or alter, or take away any of the rights, privileges, or powers of the *Great Western Company* otherwise than is by this Act expressly provided," and

contended that this prevented the reading the Act so as to take away the right of the *Great Western Company* as a landowner to the arbitration machinery of the *Lands Clauses Act* and their rights under sect. 16 of that Act. There again is a fallacy. The argument begs the question whether the *Great Western Company* has got such rights.

Both parties claimed sect. 28 of the special Act as being in their favour. To my mind, if this section bears in favour of either party, it bears rather in favour of the *Swindon Company*, on the ground that it brings certain easements within the provisions relating to land from which it is rather to be inferred that other easements not mentioned were not intended to come within them, I agree, however, with the Master of the Rolls and Lord Justice *Cotton* that this is not to be pressed against the *Great Western Company*. It seems to me that the greatest injustice might be done if general rules of construction, which are useful enough for interpreting general Acts of Parliament drawn with great care, were rigorously applied to clauses stuck into a railway bill at the last moment when the bill is before a committee. We must not close our eyes to the well-known course of proceeding in these matters. These sections in Railway Acts, as every one knows perfectly well, are often drawn by business men or their counsel at a moment's notice, and must not be read as if they were carefully framed clauses deliberately drawn by a conveyancer. I, therefore, do not press this argument against the *Great Western Company*. I am clearly of opinion, however, that they are not within the clause, because it only applies to persons who have a discretion whether they will grant an easement or not, and the *Great Western Company* have no such discretion, for under sub-sect. 8 if the *Swindon Company* require to have the easement in question the *Great Western Company* are bound to grant it.

There is only one other argument to which I wish to refer. It is said that there is no limit as to time, and that the *Great Western Company* will be thrown into a state of great uncertainty as to when this power is going to be exercised by the *Swindon Company*. The answer is that the *Swindon Company* are limited to a five years' term by sect. 31, and as regards the *Great Western*

C. A. 1882 — GREAT WESTERN RAILWAY CO. v. SWINDON AND CHELTENHAM EXTENSION RAILWAY CO. — Bowen, L.J.

Company the only question is whether the *Swindon Company* are limited to five years or to three.

In my opinion what the *Swindon Company* are proposing to do is not a taking of land in any sense. It is the carrying into effect an obligation which is imposed by Parliament on the *Great Western Company* for the benefit of the *Swindon Company*, namely, the granting to the *Swindon Company* something which is in some ways analogous to, though not strictly the same as, running powers over a limited portion of the *Great Western* line, leaving all the property of that portion of the *Great Western* line in the *Great Western Railway Company*, although the *Swindon Railway Company* are to use it. I, therefore, agree with the Master of the Rolls that the judgment of Mr. Justice *Chitty* must be reversed.

Solicitor for *Great Western Railway Company: R. R. Nelson.*

Solicitors for *Swindon Railway Company: George Davis, Son, & Co.*

H. C. J.

C. A. 1883 — Jan. 11.

In re MUTUAL SOCIETY.

Winding-up—Practice—Companies Act, 1862, *s.* 165 [*Revised Ed. Statutes, vol. xiv. p.* 238]—*Affidavit embracing distinct Cases against different Parties—Affidavit of Documents by Official Liquidator.*

The official liquidator of a company applied, under sect. 165 of the *Companies Act*, 1862, to make a number of gentlemen, some of whom were and others had been directors, responsible for acts of misfeasance. The alleged acts were 107 in number. *E.* had been a director only during the period in which the first eleven of these acts were done, and it was not sought to make him liable in respect of any others. The liquidator filed an affidavit of 1150 folios, including all the cases. *E.*, who appeared alone, applied for an order that the liquidator might state what paragraphs he intended to read against *E.* It appeared that *E.'s* solicitor had borrowed the affidavit and was, on his own shewing, able to make out what parts of the affidavit affected *E.*:—

Held, affirming the decision of *Chitty*, J., that *E.'s* application must be refused, for that although the Court would interfere if the cases against different parties were mixed up together in a way which was oppressive, a Defendant must, as a general rule, ascertain for himself what part of the

Plaintiff's evidence affects him, and that there were no circumstances in the present case to take it out of the general rule.

E. applied that the official liquidator might be ordered to make the usual affidavit as to documents in his possession:—

Held, affirming the decision of *Chitty*, J., that such an order ought not to be made, for that the official liquidator, being an officer of the Court, is not, even in proceedings under sect. 165, in the position of an ordinary litigant, and will not, in the absence of special circumstances, be required to make an affidavit as to documents in his possession, though he is bound to produce to the adverse litigant the documents which the latter requires to see.

IN the course of the winding-up of this company the official liquidator, on the 3rd of August, 1882, served upon *W. Emmens* and other persons, who were or had been directors of the company, notice of motion, under sect. 165 of the *Companies Act*, 1862, that they might be ordered to pay the damages mentioned in the schedule for 107 alleged acts of misfeasance, consisting in the carrying out of various loan transactions between the 14th of February, 1871, and the 10th of January, 1879. *Emmens* had ceased to attend as a director on the 21st of November, 1871, and the notice only sought to make him liable in respect of eleven of the acts complained of. In support of the motion the official liquidator filed four affidavits containing in all 1195 folios. One affidavit alone contained 1150 folios.

Emmens, who appeared by a separate solicitor, moved *inter alia* that the official liquidator might be ordered to state what paragraphs of the affidavits he intended to read as evidence against *Emmens* in support of his motion, and that all other paragraphs of the affidavits might, as against *Emmens*, be struck out as tending to prejudice and embarrass him on the hearing of the motion.

The solicitor of *Emmens*, in support of this motion, made an affidavit by which, after stating the nature of the notice of motion of the official liquidator, and the filing of the above affidavits, he went on to state that the charge for a copy of the affidavits was £19 18*s.* 4*d.* That he had procured a loan of a copy of them and perused them. That out of the 107 cases of alleged misfeasance *Emmens* was sought to be charged only with eleven for loans between the 14th of February and the 18th of August, 1871. That the deponent had perused the exhibits to the affidavits, and

C. A. 1883 *In re* Mutual Society.

that it appeared from them that *Emmens* ceased to attend as a director on the 21st of November, 1871, and that as to four of those eleven acts it did not appear that *Emmens* was in any way concerned with them. That the greater part of the longest affidavit was taken up with alleging facts connected with loans which did not take place while *Emmens* was a director. That the deponent had had the paragraphs in the affidavit relating to the transactions in respect of which no charge was made against *Emmens* calculated, and that there were upwards of 916 folios relating exclusively to such transactions. That each of the alleged acts of misfeasance had to be carefully investigated. That the circumstances of each were distinct, and did not involve the same facts, and that the introduction into the affidavit of the matters alleged in respect of the ninety-six acts in respect of which no charge was made against *Emmens*, was irrelevant and tended to embarrass his case. That great expense would be incurred in *Emmens* having to furnish his counsel with briefs of the affidavits, and that the fees to counsel would be greatly increased; and he submitted that the greater part of the long affidavit was embarrassing, and an abuse of the practice of the Court, and that the liquidator should be required to state on what paragraphs of the affidavit he intended to rely against *Emmens*.

Mr. *Emmens* had taken out a summons asking that the official liquidator might be ordered to make the usual affidavit as to documents. The official liquidator by affidavit stated that he was willing to specify on what portions of the books he intended to rely, and to render any assistance *Emmens* might require in finding any of them. He had previously by letter made a similar offer. An order was made in Chambers on the 16th of November, 1882, directing the official liquidator to give *Emmens* access to all the books and documents of the society in his possession, and to give him all reasonable assistance in finding any document specified by him.

Emmens' motion asked to discharge this order and to have the usual affidavit of documents, as well as to have an order to the effect mentioned above as to the affidavits filed by the official liquidator. As regards the documents *Emmens'* solicitor deposed that the transactions of the society were contained in an immense

number of books, and that it was not possible for any person other than the official liquidator or his solicitors, to specify what particular books or papers were in the possession of the liquidator relating to the matters in question in the pending motions as affecting *Emmens*.

Mr. Justice *Chitty*, on the 5th of December, 1882, refused the motion. *Emmens* appealed.

Ince, Q.C., and *Stirling*, for the appeal:—

It is not reasonable that *Emmens* should be obliged to take copies of an immense mass of affidavits with nine-tenths of which he has nothing to do. The liquidator ought to state on what parts of them he means to rely, that we may take copies of those parts only. The expense of his brief will be immensely increased if he has to take a copy of the whole.

As regards the affidavit of documents, a liquidator generally is in the position of an officer of the Court, and stands neuter between the shareholders, but under the misfeasance section he is in the position of an ordinary litigant, and ought to be compelled to give the same discovery as any other litigant: *Gooch's Case* (1).

Romer, Q.C., and *Buckley*, *contrà*, were not called upon.

JESSEL, M.R.:—

This is an appeal from an order made by Mr. Justice *Chitty* upon what is in fact two applications, although in form only one. I will deal with the applications separately.

The first is a question of novelty and of considerable importance. The case may be stated shortly thus: The applicant, Mr. *Emmens*, was one of the directors of the *Mutual Society*, which is now being wound up. The official liquidator has taken out a summons under the 165th section of the *Companies Act*, 1862, to make Mr. *Emmens* and the other directors of that society liable for certain alleged misfeasances in their conduct of the business of the society. There are 107 cases of misfeasance alleged against the directors, but Mr. *Emmens* having retired many years ago from the direction, is only charged with participation in eleven

(1) Law Rep. 7 Ch. 207.

C. A. 1883 *In re* MUTUAL SOCIETY. Jessel, M.R.

of them. Other directors, however, who also are alleged to have participated in those eleven acts of misfeasance, or some of them, continued to be directors for a long time after Mr. *Emmens* retired, and are charged with participation in many of the subsequent acts of misfeasance. As I understand it the substance of the case against all the directors is much the same, they are charged with lending money improperly and not in accordance with the rules of the society. The official liquidator has filed a very long affidavit containing a statement of the case against all the directors; that is, it contains the 107 charges of misfeasance against the various groups of directors who are sought to be affected by those charges. What Mr. *Emmens* complains of is this. He says in substance, "I am only concerned with eleven of those charges. I do not complain that they are included in the same notice of motion with the others, for it is convenient that the whole of the cases which arise in the affairs of one society, and all depend more or less on similar principles, should be tried together; but what I do complain of is, that whereas I am concerned only in eleven of the charges, I am burdened with the expense of taking an office copy of a very long affidavit, nine-tenths of which does not relate at all to my case, and I ask that the official liquidator should state what portions of the affidavit relate to my case, so that I may take a copy of those portions only." Now, that is not unreasonable *ex facie*, but it is novel, because when an action is brought against several defendants, all of whom are not concerned in the whole subject of the action, which is a very common case indeed in the Chancery Division, the plaintiff is never called upon to tell the defendant what portions of the evidence affect him; he has to find that out for himself. When the evidence is taken orally it is not till the conclusion of the plaintiff's case that the defendant can find out how much of the evidence affects his own particular case. When the evidence is given by affidavit of course the defendants have an opportunity of finding out at an early period how much of the evidence relates to their respective cases. But as a general rule the defendants have no right or pretence of right to call on the plaintiff to point out what portions of the evidence affect them respectively. I do not mean to say that the Court would not interfere in a case of great oppres-

sion or impropriety on the part of the plaintiff. In a gross case the Court probably would order the affidavit to be taken off the file, as having been improperly filed, or it might compel the plaintiff to state how much of his affidavit affects the particular defendant who complains. But in this particular case I am not persuaded that there is any hardship inflicted on the present applicant, or that there is any ground whatever for this application.

In the first place we must recollect that the Appellant appears alone. That is not the usual course. Before laying down any new rule we should be careful to consider whether it would increase the expense of proceedings of this kind. As a general rule the directors appear together, their solicitor takes a copy of the evidence for all, and for the purpose of making out his briefs he ascertains how much applies to one defendant's case, and how much applies to another, and there is no difficulty in apportioning the costs of the copy accordingly. Where a solicitor does not appear for several defendants or several respondents it is usual for him to obtain copies from the solicitor or solicitors who appear for those who are concerned in the whole case. This is what actually occurred in the present case: the solicitor of Mr. *Emmens*, through the courtesy of the solicitor concerned for other directors who were connected with the whole case, obtained a sight of a copy of the affidavits without himself taking an office copy, so that he actually knew what the contents of the affidavits were.

There is another point in the case. When he saw that copy was he embarrassed by it? Did he find any difficulty in ascertaining how much of it related to the case of Mr. *Emmens?* Not at all. He has told us in his affidavit that he could ascertain and has ascertained how much is wholly irrelevant to the case of Mr. *Emmens*, and how much relates to it. What then was his proper course? He should have written a letter to the solicitor on the other side asking him to point out what portions of the affidavit he intended to rely on as against Mr. *Emmens*. He did not take that course, but served the official liquidator with this summons, which was afterwards adjourned into Court at an expense far exceeding the whole expense of taking an office copy of the entire

C. A. 1883 *In re* Mutual Society. Jessel, M.R.

affidavit. It appears to me, therefore, that in this particular instance the applicant has no merits. There being a very ample discretion vested in the Judge as to what he should do in reference to matters of this kind, I think the Judge in the Court below rightly exercised that discretion, and it is well known that the Court of Appeal does not, except in extreme cases, interfere with the exercise of such discretion.

I now go to the second point, which is by no means without importance. It is an application that the official liquidator shall make an affidavit as to documents. The expense and delay occasioned by requiring such an affidavit would be very great. An official liquidator is not in the same position as an ordinary litigant, he is an officer of the Court and is under the control of the Court. If he will not do what the Court requires him to do the Court will remove him, and if he does anything which the Court thinks he ought not to do the Court will compel him to act otherwise. The ordinary course pursued in my chambers when I presided at the Rolls Court—and I believe the practice to be the same in the chambers of other Judges—was this, that whenever a hostile litigant, as Mr. *Emmens* is in this case, wanted documents, he applied to the official liquidator to see them, and the official liquidator was bound to shew him all the documents on which he relied, and any other documents which the litigant desired to see. In the present case the Appellant never applied to the liquidator as he ought to have done for liberty to inspect the documents. If he had done so, and the official liquidator had refused to shew them, then the Court would have ordered the liquidator to produce them. He has already offered to shew all his documents, and he has repeated that offer before the Court. It appears to me that under those circumstances the appeal must be dismissed with costs.

Lindley, L.J.:—

I am of the same opinion. Taking the second point first, it appears to me as a matter of practice that an official liquidator ought not to be compelled to make an affidavit of documents unless there is some special reason for it. The official liquidator, by letter of the 3rd of November, offered to produce all

the documents in his possession. If there had been any special ground for distrusting him or for supposing he was trying to avoid the production of any particular document, there would be reason for some special application, whatever the form might be. But it must be understood that the liquidator is an officer of the Court, who is not in the same position as an ordinary litigant. He is not called upon to make an affidavit of documents as a matter of course, and there are no special grounds shewn in this case for ordering him to do so.

The other point is new and important. The official liquidator has taken out a summons against a number of gentlemen who had been directors, seeking to make them responsible for breaches of trust under sect. 165 of the *Companies Act*, 1862, and in support of that application he has filed an affidavit which runs over something like 250 foolscap pages. There are some of the directors to whom some parts of that affidavit do not relate. The present application on the part of one of the directors who has appeared alone is that the official liquidator may be obliged to say which of the paragraphs in that very long affidavit are going to be relied on against this particular director. That, I need hardly say, is a very novel application, and the question is whether it is right, and, if so, upon what grounds?

It certainly strikes me as possible that a long affidavit like this may be so framed as to be oppressive and an abuse of the practice of the Court. The person filing it may have a short case against one person and may mix it up with long statements relating only to the case against other persons in such a way that it would be difficult for the advisers of the first mentioned person to say that there were any parts of the affidavit with which he had nothing to do. If any such case had been made out here we should have found out how to deal with it either by taking the affidavit off the file or in some other way. But this application is not made on the ground of oppression, nor upon the ground that the applicant is embarrassed, and cannot find out how much of the affidavit concerns him and how much does not. On the contrary, his solicitor's affidavit shews that he has found out, and knows perfectly well, what parts of the affidavit he needs to consider. The application is said to be made with a view to save expense, and it was urged that it would be much less expensive if the liquidator would point

C. A. 1883 *In re* Mutual Society.

out now what paragraphs in this affidavit he relies on, so that the Appellant need not copy anything more. The Appellant seeks to have an assurance that nothing will be used against him except the particular passages in the affidavit which may be now selected by the official liquidator. It appears to me that this is wrong in principle. This gentleman knows his own case, and must judge for himself what parts of the affidavit concern him. I agree that the appeal should be dismissed with costs.

Bowen, L.J.:—

I am of the same opinion.

Solicitors: *C. & S. Harrison & Co.; Linklater & Co.*

H. C. J.

C. A. 1882 KAY, J. *Nov.* 30. C. A. 1883 *Jan.* 11.

WALKER *v.* BUNKELL.

Practice—Report of Official Referee—Motion for Judgment—Judicature Act, 1873, *ss.* 56, 57, 58—*Rules of Court*, 1875, *Order* XXXVI. *r.* 34.

In an action for an account an order was made under Order XXXIII. to take an account, without prejudice to the proceedings in the action generally being carried on. By a subsequent order it was directed that the accounts should be taken by the official referee. The referee made a report finding a sum due from the Plaintiff. The Plaintiff moved that the report might be set aside and the accounts remitted to the referee, and that he might be directed to state his reasons. The Defendant at the same time moved that the report might be confirmed and the Plaintiff ordered to pay the sum found due. *Kay*, J., refused both motions, holding that a motion to confirm the report was unnecessary, that the action ought to be set down for trial, and that the Plaintiff could object to the report at the hearing. The Defendant appealed:—

Held, by the Court of Appeal, that the proper course was not to set down the action for trial, but for the Defendant to move for judgment on the report, and for the Plaintiff to move to set the report aside. Both the orders of *Kay*, J., were discharged, and the two motions remitted to him to be disposed of on the merits:—

Held, also, that the proviso as to the order to take the accounts being without prejudice to the proceedings in the action generally being carried on ought not to have been inserted.

THE statement of claim in this action alleged divers transactions of a partnership character between the Plaintiff and the

Defendant, and also alleged that advances had from time to time been made by the Plaintiff to the Defendant. The Plaintiff claimed to have an account taken of the dealings and transactions between him and the Defendant, and to have the balance paid. A statement of defence was put in. After this, before anything else was done, the Defendant applied in Chambers under Order XXXIII. for an order for accounts, and on the 14th of November, 1879, an order was made to take "an account of all dealings and transactions between the Plaintiff and the Defendant from the 1st of January, 1877. And it is ordered that the costs of this application be costs in the cause, and this order is to be without prejudice to the proceedings in the action generally being carried on and prosecuted." A reply was delivered, but no other steps were taken except under the order. On the 3rd of March, 1882, an order was made on the Defendant's application, "that it be referred to the official referee to take the accounts directed to be taken by the order of the 14th of November, 1879, and to report the amount found to be due from either of the parties to the other." The costs were to be costs in the cause, and liberty to apply was given.

The official referee took the accounts, and on the 8th of August, 1882, made a report by which he found that £1060 was due from the Plaintiff to the Defendant.

The Defendant gave notice of motion for an order that the report might be confirmed, and that the Plaintiff might pay the £1060 and the costs of the action.

The Plaintiff's solicitors wrote to the Defendant's solicitors to say that they were advised that the proper course was not to bring the motion on as an ordinary motion, but to set it down as a motion for judgment, and that then the Plaintiff could take out a summons or move to remit the report for consideration, which motion or summons would come on for hearing with the motion for judgment. The Defendant did not accede to this, and the Plaintiff therefore gave notice of motion that the report of the official referee might be set aside, and that the questions referred to him might be remitted for reconsideration, and that he should be required to state the reasons for his conclusions on the accounts. The motions came on as ordinary motions on the same

C. A. 1883 WALKER v. BUNKELL.

day. The Plaintiff's motion was heard first, and Mr. Justice *Kay* dismissed it with costs. The motions were heard on the 30th of November, 1882.

Kekewich, Q.C., and *Oppenheim*, for the Defendant's motion :—

The official referee has made his report, and we are now entitled to move for judgment.

[KAY, J. :—What authority have you for that? I think you ought to set the cause down for trial.]

Munro v. *Rendall* (before the Master of the Rolls, February 15, 1878) is an authority for the course we have taken. Under the *Judicature Act*, 1873, s. 58, the report is equivalent to a verdict.

Hastings, Q.C., and *Lock*, *contrà*, were not called upon.

KAY, J. :—

In this case there has been a preliminary reference to the official referee, and he finds a sum due from the Plaintiff to the Defendant. The Defendant now asks for judgment in his favour. No authority in support of that course has been produced. Where a preliminary inquiry has been directed before the trial, the proper course is to set the case down for trial, which under Order XXXVI., r. 4, the Defendant can do if the Plaintiff omits to do so. Either party can take exception to the report, and the proper time to do so is when the action comes on for trial, and no application to confirm the report is necessary. I refuse the motion with costs.

T. F. M.

C. A.

The Defendant appealed, and the appeal was heard on the 11th of January, 1883.

Kekewich, Q.C., and *Dibdin*, having opened the appeal were stopped by the Court.

Hastings, Q.C., and *Lock*, for the Plaintiff :—

The motion was altogether irregular, and we warned the Defendant of this before he moved.

[JESSEL, M.R.:—It was no doubt irregular in this respect, that it ought to have been set down and not brought on as an ordinary motion, but that is not a sufficient reason for dismissing it with costs.]

Kay, J., considered that the action ought to come on for trial.

[JESSEL, M.R.:—With deference to the learned Judge there was nothing to try. The official referee has tried it, and there is a verdict against you. The reference to the official referee is equivalent to a decree for an account.]

Order XXXIII. enables the Judge to direct a preliminary account, though there is some special or further relief sought for or some special issue to be tried as to which it may be proper that the case should proceed in the ordinary manner.

[JESSEL, M.R.:—There is nothing of that kind here, and the reference to take the account is a final decree.]

In Mr. Justice *Kay's* Court if an inquiry is directed under Order XXXIII., and no further trial is required, the clause is inserted: "The Court not requiring a further trial of this action, adjourn further consideration."

[JESSEL, M.R.:—That is a very proper proviso, but it is not necessary.]

If the Court is of that opinion that is enough. It is very desirable to have the practice settled. But how in that case are the costs to be disposed of?

[JESSEL, M.R.:—On the motion for judgment, and if there is anything in the evidence to vary the general rule that the costs follow the event the attention of the Court must be called to it.]

The order here was made expressly without prejudice to the proceedings in the action being carried on.

[JESSEL, M.R.:—That saving ought not to have been inserted.]

It is the Defendant's order, and if there is any blunder he is the person responsible. The obvious intention was that the reference should not be treated as a complete decree.

[JESSEL, M.R.:—There is nothing more to try. You have

C. A. 1883

WALKER v. BUNKELL.

not appealed from the refusal of your motion, and the report stands.]

We did not appeal because Mr. Justice *Kay* said we were both wrong and that our objections to the report could be dealt with at the trial.

[JESSEL, M.R.:—Under sect. 58 the report is equivalent to a verdict. You may apply for a new trial or to set aside the verdict as given by mistake or as against the evidence.]

We submit that it is like the certificate of a chief clerk, to which objections can be taken.

[JESSEL, M.R.:—When an official referee has evidence given before him the proceeding is a trial, and his report is equivalent to a verdict. A report not made on evidence, as where a surveyor is sent by the Court to look at a house and report, stands on quite a different footing. The course is to move to set aside the report: *Dunkirk Colliery Company* v. *Lever* (1). But your motion to impeach the report has failed, and you are out of time for appealing.]

We did not appeal in consequence of the view expressed by Mr. Justice *Kay* that we should have an opportunity of stating our objections to the report.

[*Kekewich*:—We admit that in fairness the Plaintiff ought to have an opportunity of doing so.]

JESSEL, M.R.:—

The admission made on the part of the Defendant is fair and proper. There has been here a miscarriage, and that justice may be done it will be best to discharge both orders, and remit the case to Mr. Justice *Kay*, that he may hear both motions on their merits. The Defendant's motion for judgment will be treated as set down on the day when it came before Mr. Justice *Kay*.

LINDLEY, and BOWEN, L.JJ., concurred.

Solicitors for Plaintiff: *Walker & Mewburn Walker.*
Solicitors for Defendant: *Chorley, Crawford, & Chester.*

(1) 9 Ch. D. 20.

H. C. J.

In re SPEIGHT.
SPEIGHT *v.* GAUNT.

[1881 S. 2862.]

C. A.
1882
V.-C. B.
June 7, 8, 9, 10, 13.
C. A.
1883
Jan. 19, 20.

Trustee and Cestui que Trust—Loss of Trust Fund—Employment of Broker—Ordinary Course of Business—Negligence.

A trustee is bound to conduct the business of the trust in the same way in which an ordinary prudent man of business conducts his own, and has no further obligation. He may employ brokers and agents in cases in which they are employed in the ordinary course of business.

A trustee, with the consent of his *cestuis que trust*, employed a broker for the investment of £15,000 of the trust funds in corporation stocks. On the day before the next settling-day the broker brought to the trustee a bought-note and obtained the £15,000 from him, on the statement that the money would have to be paid next day. The space left in the bought-note for the date of the settling-day was not filled up, and no charge was inserted for commission.

The broker never acquired the securities, but appropriated the money to his own purposes, as was discovered about a month afterwards when he became bankrupt. A few days after the payment, the trustee had inquired of the broker whether the securities were ready, and was told it would take some time to obtain them. On subsequent occasions similar excuses were given. There was evidence that about a fortnight was generally required to get corporation bonds completed when obtained direct, the broker holding in the meantime a banker's receipt for the money.

Evidence was given that the form of the bought-note would indicate to brokers, though probably not to others, that the bonds were to be procured from the corporation direct:—

Held (reversing the judgment of *Bacon*, V.C.), that the trustee having acted in the ordinary course of business was not liable to make good the loss occasioned by the embezzlement of the trust moneys by the broker.

Whether the trustee would have been justified in paying the money to the broker if he had had notice that the bonds were to be procured direct from the corporation—*Quære.*

Bostock v. *Floyer* (1) explained.

Hopgood v. *Parkin* (2) questioned.

BY his will dated the 16th of February, 1875, *John Speight*, who was a stuff manufacturer at *Bradford*, bequeathed his real and personal estate to *Isaac Gaunt* and *Alfred Wilkinson*, whom he appointed trustees and executors of his will, upon certain trusts

(1) Law Rep. 1 Eq. 26. (2) Law Rep. 11 Eq. 74.

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT.

for conversion and investment in or upon, amongst other securities, the stocks, funds, debentures, mortgages, or securities of any company, corporation, or public body incorporated by Royal Charter or special Act of Parliament. The testator died on the 31st of March, 1877, leaving a widow and three children: *Lucy Ellen*, who attained twenty-one in August, 1879; *Charles Henry*, who attained twenty-one in October, 1880; and *Ferdinand Longfield*, an infant about ten years old when his father died. In January, 1879, *Alfred Wilkinson*, who had for some time been in embarrassed circumstances and had misappropriated money belonging to the estate (since recovered from him, see *Ex parte Stubbins, In re Wilkinson* (1)), filed a petition for liquidation, and since the commencement of the liquidation the trust funds, though still standing to the joint account and in the joint names of *Gaunt* and *Wilkinson*, had been under the entire control of *Gaunt*, who carried on business at *Stanningley*, four miles from *Bradford*, five from *Leeds*, and fourteen from *Huddersfield*, and was an intimate friend of the testator and his family. Upon the coming of age, in October, 1880, of *C. H. Speight*, he was put into possession of the business carried on by his father, and of certain assets of the trust estate on account of his share to the value of £14,000.

About this period some of the securities and shares forming part of the testator's estate were sold in order to provide equivalent appropriations for the shares of the other two children, and the proceeds were paid into the *Bradford Bank* to the credit of the trust account. The broker employed in these sales, at the request of the family, was *Richard Ernest Cooke*, a young man who carried on business as a stockbroker in *Bradford*, under the style of *John Cooke & Son*, in succession to his father, who shortly before his death in 1877 had taken his son into partnership; the firm standing in high repute and being considered as among the very first brokers in *Bradford*. The testator had employed the firm as his brokers.

The question of reinvesting the proceeds of these sales, which were lying at the *Bradford Bank* on deposit, and amounted to a considerable sum, was discussed between *Gaunt* and the family. An investment in consols was proposed by *Gaunt*, but the family

(1) 17 Ch. D. 58.

objected on the ground of the smallness of the interest. It was then suggested that, instead of consols, *Yorkshire* corporation securities should be bought. The family assented to this, and, according to *Gaunt's* statement in evidence (which was adopted by the Court) they expressed a wish that *Cooke*, whom they knew, and whose firm had been employed by the testator as his brokers, should be employed as the broker, and not Messrs. *Rhodes & Raynor*, of *Leeds*, whom *Gaunt* mentioned as being his own brokers, adding, "It is your money and you can do as you like with it." Early in February, 1881, *Gaunt* saw *Cooke*, and told him that they were going to invest £15,000 in corporation stocks, and instructed him to buy £5000 *Halifax*, £5000 *Huddersfield*, and £5000 *Leeds*. Something was mentioned about commission, and *Cooke* said that he could do the matter so far as *Gaunt* was concerned without commission, and would get paid by the other side. *Cooke* called a few days later, and told *Gaunt* that he had arranged for the securities, that he should be some days yet, but would let him know in time and would not come for the money before he wanted it.

On the 24th of February, 1881, *Cooke* brought to *Gaunt* a "bought-note," filled up on a printed form, which was as follows:—

"*John Cooke & Son*, stockbrokers,

"*Exchange, Bank Street, Bradford*, Feb. 24, 1881.

"To the executors of the late *John Speight*.

"We have this day bought for you as per your order, subject to the rules of the *London Stock Exchange*:—

				Commissions.			
"£5000 *Leeds* Corporation Debenture Stock			105½	nett	£5275	0	0
"£5000 *Huddersfield*	do.	do.	100	nett	£5000	0	0
"£5000 *Halifax*	do.	do.	100	nett	£5000	0	0
					£15,275	0	0

"Account . (Signed) *John Cooke & Son*."

No date was added after the word Account.

Cooke said he wanted the money for these stocks to pay next day. *Gaunt* sent him to his cashier, with instructions to draw out three cheques for the several amounts and bring them back for

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT.

him to sign, which was accordingly done, the three cheques for £5275, £5000, and £5000, being drawn in favour of "Messrs. *John Cooke & Son*," or order, and signed "*Isaac Gaunt*, for self and co-executor;" the bought-note in respect of which the cheques were drawn being left by *Cooke* with *Musgrave, Gaunt's* cashier. On the following Monday (the 28th of February), *Gaunt* went to *Cooke* and asked him if the securities had come, to which *Cooke* said that they had not come yet, there had not been time. *Gaunt* again asked when they would be there, and he said he could not tell, that they took some time to make out.

Gaunt on other occasions, subsequently to giving the cheques, made inquiries of *Cooke* as to when the securities were going to be handed over, but was from time to time put off with similar excuses. On the 28th of March, *Cooke* filed a liquidation petition on which he was adjudicated bankrupt, and he had since absconded without having procured any bonds and having appropriated the cheques a day or two after he obtained them to his own use, so that the £15,275 was absolutely lost.

In these circumstances Mrs. *Speight* and her two children other than *C. H. Speight* brought their action claiming a declaration that *Gaunt* had committed a breach of trust with reference to the £15,275, part of the trust estate, paid by him to *Cooke* and the intended investment thereof, and an order for him to make good to the estate the loss arising from such breach of trust, together with interest at 4 per cent.

It appeared from the evidence that municipal corporations were in the habit of advertising in the local newspapers when they were prepared to receive loans upon the security of bonds or debentures; such advertisements had appeared in respect of two of the three corporations in the years 1878 and 1879, and in the case of the other in 1881. In the case of the larger towns, such as *Leeds*, corporation stock was quoted in the market; but *Huddersfield* and *Halifax* stocks were not quoted in the market, and could only be obtained from the corporation or from any holder who wished to sell. In the ordinary course, when the stock was obtained direct from the corporation, the applicant obtained from the town clerk or borough accountant a form, which he filled up and returned, in order that the necessary securities might be prepared. The

amount would then be paid by the applicant to the corporation bankers, who would give him a stamped receipt pending the preparation of the security, and when prepared the bankers' receipt would be exchanged for the security. In the majority of cases applications were made to the corporation by the public direct; but a considerable proportion came through bankers, solicitors, and brokers, brokers being the least frequent, and in such cases a commission of 2*s.* 6*d.*, 5*s.* 3*d.*, or 10*s.* per cent. was paid to them by the corporation. In dealing direct with the corporation an advice note might be dispensed with, and the broker might explain the matter to his client, but not unfrequently brokers filled up the common form bought-notes such as they used on purchases in the market without specifying whether the securities were being obtained by purchase or by application. Evidence was given to the effect that the bought-note in this case, though not suggestive of anything fraudulent or fictitious in the transaction, was incomplete and unbusinesslike in not specifying whether the transaction was for cash, or, if not a cash transaction, when payment was to be made; and the expert witnesses said they should infer that it referred to stocks bought not in the market but direct from the corporations; but they did not think the public would do so. *Gaunt* stated that he had simply instructed *Cooke* to get the bonds, and had not the least idea when he gave the cheque whether he was getting them direct or by purchase. It was stated to be the usual, and almost invariable, practice for brokers who were instructed to buy securities to receive the money from their clients without waiting until the securities purchased were actually delivered, and in cases where an interim banker's receipt was given to retain the receipt in their own hands until it was exchanged for the complete securities, which were then handed over to the client. It was said to be very rare to leave the money with bankers to be held by them until that event. Since *Cooke's* failure this had been done to a considerable extent in *Bradford*, but brokers of *London* and *Leeds* who gave evidence, stated that it was not the practice and would not work as a general rule. A *Bradford* banker, on the other hand, said that he had always advised his customers to effect their investments through a bank, and many had done so.

C. A. 1883

In re SPEIGHT.

SPEIGHT *v.* GAUNT.

The action came on for hearing before Vice-Chancellor *Bacon* on the 7th of June, 1882.

Millar, Q.C., *Stirling*, and *Lockwood*, for Plaintiffs :—

It is clear upon the evidence that the employment of a broker for the purchase of corporation stock was not only unnecessary but was most unusual, and in permitting the money to remain without security in the custody and power of the broker, without that necessity, which includes the regular course of business, there has been such a want of due and proper precaution on the part of the Defendant *Gaunt* as will render him liable for the loss of the trust funds: *Clough* v. *Bond* (1); *Matthews* v. *Brise* (2). The money should have been paid by the trustee into the bank of the corporation, and no man of ordinary prudence who had instructed his broker to buy stock for him would, like the Defendant, have trusted merely to the broker's statement, and waited for five weeks without taking any steps to ascertain whether the stock had actually been bought beyond personal inquiries of the broker: *Mendes* v. *Guedalla* (3). As between two innocent parties, one of whom must suffer for the wrongful acts of the broker, the loss must fall on the trustee who employed the dishonest broker, and did not take all the precautions he might have taken against being deceived: *Bostock* v. *Floyer* (4); *Sutton* v. *Wilders* (5); *Hopgood* v. *Parkin* (6). In this case the unusual form of the bought-note, with no date inserted for the completion of the purchase and no commission made payable, was in itself enough to have excited suspicion, and at all events to have prevented *Gaunt* from handing over upon such a document the whole £15,000 to *Cooke*, by cheque made payable to his firm and not to the bankers of the corporations. Gross negligence was also shewn in allowing the money to remain in *Cooke's* hands without security, and without insisting upon more definite information from the 24th of February until the 28th of March.

Hemming, Q.C., and *J. G. Wood*, for the Defendant :—

In order to fix the Defendant with liability it must be clearly

(1) 3 My. & Cr. 490.
(2) 6 Beav. 239.
(3) 2 J. & H. 259.
(4) Law Rep. 1 Eq. 26.
(5) Ibid. 12 Eq. 373.
(6) Ibid. 11 Eq. 74.

8 Jun 1878

shewn that he has departed from the ordinary course which a reasonable prudent man of business would have adopted in dealing with his own money. A trustee or executor who has dealt with the trust funds in the same way as a man of ordinary prudence would have dealt with his own money will not be held liable for the loss, without any default on his part, of sums which he has honestly paid and for a proper purpose: *In re Bird* (1); *Job* v. *Job* (2); *Jones* v. *Lewis* (3). There was no wilful default or negligence on the part of *Gaunt* in employing, at the request of the family, *Cooke*, who had the largest business of any broker in *Bradford*, to make the investment. Was there anything in the face of the "bought-note" to excite suspicion? The absence of any date for completion of the transaction was at most an irregularity, but an irregularity which would be immaterial if accompanied, as it was, by a verbal explanation on the part of the broker as to when the money was wanted, and at all events was not such a circumstance as to induce *Gaunt* to withhold the cheques. Nor is there any ground for impeaching the transaction in the circumstance that it was arranged that *Cooke* should not charge any commission for the investment, but do it "nett." We admit that it is not usual to leave money on deposit with brokers for the purpose of discretionary investment, but on the other hand it is the regular, ordinary, and almost invariable course for persons investing their money in the purchase of securities, on getting the bought or advice note to give their broker a cheque for the amount, which cheque will be retained by the broker without security during the interval between the purchase and the transfer of the securities. In following this regular and ordinary course the Defendant acted as any other prudent man of business would have acted in investing his own money, and therefore cannot upon the authorities be held liable for a loss which has not been occasioned by any default or irregularity on his part. No case will be found in which the Court has fixed with liability a trustee who, on investing the trust fund in securities authorized by his trust deed, hands over, upon getting the advice-note, the money to the broker to enable him to complete the transaction.

(1) Law Rep. 16 Eq. 203. (2) 6 Ch. D. 562.
(3) 2 Ves. Sen. 240.

C. A. 1883 *In re* SPEIGHT. SPEIGHT v. GAUNT.

The loss might equally have occurred if the money had been placed in the custody of a banker until it could be exchanged for the securities, but in such a case the trustee would not have been held liable. Can it then be said that the risk in the one case is to be so distinguished from the risk in the other, that a trustee adopting the usual course of leaving the money with his broker to complete payment according to the bought-note is guilty of wilful default? The practice of conveyancers to insert an indemnity clause protecting trustees who have not been guilty of wilful default from liability in respect of loss occasioned by brokers or bankers has been recognised and extended by 22 & 23 Vict. c. 35, s. 31, and is material as shewing that risks from the dishonesty of bankers and brokers stand on the same footing. Bankers have failed and misappropriated money as well as brokers, and if the ordinary course of business is followed, a trustee is no more liable for trusting a broker in a matter within the scope of his employment than for trusting a banker within the scope of his.

Millar, in reply:—

Gaunt did not do his duty as trustee. He exercised no precaution whatever, did not consult a solicitor, and simply trusted the broker's statement without insisting upon seeing the receipt or ascertaining who were the persons, either the corporations or the sellers in the market, to whom the money had been paid. He is not exonerated from liability to make good the loss of the trust fund which has been caused by his neglect either by the ordinary trustee indemnity clause or by 22 & 23 Vict. c. 35, s. 31: *Dix* v. *Burford* (1); *Brumridge* v. *Brumridge* (2), and he must therefore be held liable to replace the £15,000 with interest and to pay the costs of the action: *Drosier* v. *Brereton* (3).

BACON, V.C.:—

Of all the cases in which the Court is engaged, in none can there be more difficulty or delicacy than in such a case as the one before me presents. A heavy loss has been sustained, and

(1) 19 Beav. 409. (2) 27 Beav. 5.

(3) 15 Beav. 221, 226.

the question by whom the loss is to be borne is the question I have to decide. The facts of the case cannot be said to be in dispute: there is only one thing in dispute which is wholly unimportant, viz., whether Mr. *Gaunt* was induced to employ *Cooke*, the broker, either at the request or with the sanction of the *cestuis que trust*. Whether that was so or not is a matter of no kind of importance. If he yielded to their request, it leaves the case exactly where it was; if he did not do so then there is no foundation for it. [His Lordship after stating the facts; the instructions for investment given by *Gaunt* to *Cooke;* the inference drawn from the "bought-note" by the witnesses, that it imported the fact that *Cooke* had in pursuance of his instructions gone to the several corporations and contracted with each of them for the sums therein mentioned; *Gaunt's* frequent applications for the securities, and *Cooke's* answer that it took some time to prepare the securities, but that they were in course of preparation, proceeded:—]

Can it be said with the slightest hope of success after that that Mr. *Gaunt* did not know or believe at least that his money had gone to the three corporations? No reason was suggested to him why he had not the securities except that it took some time to prepare them. Whatever, therefore, be the defects in the scrap of paper (the bought-note), this I take to be clear on the contents of the paper and the statement of witnesses—that on the 24th of February, *Cooke* presented himself to Mr. *Gaunt*, and said: "I have brought for you £15,000 worth of this stock. Time will be required before the securities can be handed over to you, but in the meantime hand me £15,000." Thereupon, without more (and there is no more in the case than what I have stated), Mr. *Gaunt* sends *Cooke* to the accountant, Mr. *Musgrave*, who upon production of that paper (which he thought contained instructions enough for him) draws three cheques for the sum total mentioned in the paper, and gives them to *Cooke* to take back to *Gaunt*, which *Cooke* does, and *Gaunt* signs those cheques which *Cooke* afterwards makes available for his own purposes. He gets the money, in short he steals it, and makes away with it, and being bankrupt within a month after that time, disappears immediately afterwards, and neither *Cooke* nor the £15,000 are available. The

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. V.-C. B.

£15,000 certainly is not in existence. Upon these facts I am asked by the Plaintiffs to say, as against *Gaunt*, that he has neglected his duty as trustee. Whether or not any moral blame could be assigned to him, he had the care and custody of the £15,000 for the widow and children. He has neglected his duty, and it is his neglect of duty which has caused the £15,000 to be lost. That it is lost is beyond question, as I have said. The simple question remains: Who is to bear the loss? The *cestuis que trust* are not to blame. Nobody has said that they have done anything, or have said anything. Even if they did favour the appointment of *Cooke* as broker, *Gaunt* was the sole actor in this transaction. I wish it to be understood that though I come to a conclusion adverse to *Gaunt* I see nothing in any part of the evidence which should induce me to think that he has acted culpably otherwise than as far as his negligence goes. That *Gaunt* was full of friendly and kindly intentions towards the family of the testator I have no doubt, and that he did his best to promote their interests preceding the 24th of February I have no doubt. Most perfectly honest intentions alone regulated his conduct. I take this early opportunity of saying that, because I think that in justice to Mr. *Gaunt* it ought to be said and borne in mind. But that does not help me to the solution of this question in the slightest degree. It becomes now, after the facts I have stated, a question of law only. The law on the subject is, and has been for centuries, too clear to admit of the possibility of doubt, and neither under Lord *St. Leonards' Act*, nor in any of the cases in which the Court has found excuses for trustees, and on some occasions has been able to relieve them from the burden sought to be cast upon them, has the Court lost sight of the plain principle that a trustee who takes another man's money into his hands is bound, whatever other duties he may have to discharge, to take care that that money shall be preserved, and not to deal with it or to do anything with it which a prudent and reasonable man would not do with his own money. That is the rule which is properly to be applied to this and to all such like cases.

Now when I come to apply that rule to this case can I or anybody else say that a trustee with £15,000 of other people's money in his hands should have parted with it to *Cooke* upon that scrap

of paper? Certainly not. The paper, upon the face of it, as a witness has said, as to Mr. *Gaunt*, meant "your money is to go to the corporations," and *Cooke* in answer to inquiries said in effect, "You are to have security for it, but it will take time to prepare the security—you must have a receipt, certificate, scrip, or something of the kind." Mr. *Gaunt* as a man of business accepts the excuse from *Cooke*, of whom he knew nothing except that he was a stockbroker carrying on business in succession to his father, and that nobody had said anything against his character. Nobody had said up to that time anything against his character; but to give him credit for £15,000 was a totally different thing. That is what Mr. *Gaunt* in an evil hour permitted himself to do. I say he is fixed with knowledge that *Cooke's* pretended dealings had been with the corporations, he is fixed with knowledge that the money was to go to the corporations, and he draws a cheque in favour of *Cooke*. Why? It was not *Cooke's* money. There was no deduction to be made for *Cooke's* commission, even if that could be an excuse. There was no earthly reason (and I have heard none suggested) when *Cooke* came and said to *Gaunt*, "I have bought for you £15,000 worth in three different lots—give me a cheque to pay for them," why *Gaunt* should not have drawn the cheque in favour of the corporations that had sold him the stocks. Why should he have drawn the cheque in favour of *Cooke*? Not even the notion of commission comes in, because it is quite consistent with such a scrap of paper that *Cooke* should have obeyed the suggestions of Mr. *Gaunt*, who said, "I will not have anything to do with any commission," and the evidence is this, that the corporations were in the habit of paying commission, varying according to the circumstances, to bankers, brokers, solicitors, and other agents who came to them to invest their moneys. The case goes no further. It stops there with the 24th of February. No suggestion has been made except this, that certain stockbrokers have been called—two gentlemen of great eminence, one in *London* and one in the country, who both say, "It is our custom when we buy for clients to take a cheque in order that we may pay the vendor of the stock." That may be the custom with men of their character and credit, and that may be the set custom for anything I know, but it is not a lawful

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. V.-C. B.

custom as applicable to the state of facts which I have just been describing. If they do that, well and good; but that is their affair. I cannot adopt it as a rule of law establishing a custom that if a man employs a broker and takes from him a sale-note he is thereupon at liberty to pay to that broker the price of the thing bought. Consider what a field that would open to frauds of the most flagrant character. After what I have thought it just to say of Mr. *Gaunt* it will not be supposed that I am comparing such a case as I suggest with the case before me; but if it is competent for a trustee to give a cheque to a broker and thereupon acquit himself of the discharge of his duty as a trustee if the broker has not bought (and in this case *Cooke* had not bought, or if he bought he did not fulfil the contract), what is to prevent a broker and a trustee dividing in whatever proportions might be convenient to them the results of such a transaction. If I were to hold that this payment by Mr. *Gaunt* to *Cooke* absolved Mr. *Gaunt* from the rule of law and from the duty which trustees are under faithfully to discharge the trust, such consequences might ensue. I repeat I do not assimilate that to this case, nor say it has any reference to it, except that it affords me an opportunity of saying that the rule of law not only is unquestionable, but that it is founded on absolute and distinct truth and justice, and to relax it in the slightest degree might give occasion to the committal of fraud such as might easily be imagined, for trustees have been known to exist who would not hesitate to misappropriate trust funds, and it is not impossible that brokers might be found, such as *Cooke* for example, who would assist in the spoliation of a trust fund. I say that only with reference to the rule of law, and not as having any application to this case. Upon the facts of this case as I find them, if Mr. *Gaunt* had exercised the ordinary precaution which a man takes in dealing with his own property he would not have entrusted *Cooke* with £15,000 of the trust money. Having done so, and the loss of that money having been sustained, there is nobody who is bound to make good that loss but Mr. *Gaunt*, and I am therefore bound, though very reluctantly and with great pain to myself—if I have a right to say so, for I ought not to feel pain as I have only to administer the law—to say under pressure of the law that Mr. *Gaunt* is compellable by

law to, and I must make a decree that he shall, make good the £15,275 (within six months) with interest at 4 per cent. and costs up to and including the hearing.

F. G. A. W.

From this judgment the Defendant *Gaunt* appealed.

The appeal was heard on the 19th of January, 1883.

The arguments adduced on both sides were similar to those used before the Vice-Chancellor.

Hemming, Q.C., *Davey*, Q.C., and *J. G. Wood*, for the Appellant, cited *Ex parte Belchier* (1); *Bacon* v. *Bacon* (2); *Clough* v. *Bond* (3); *Castle* v. *Warland* (4).

Millar, Q.C., and *Stirling*, for the Plaintiffs, referred to *Mendes* v. *Guedalla* (5); *Bostock* v. *Floyer* (6); *Hopgood* v. *Parkin* (7).

JESSEL, M.R.:—

This is an appeal from the decision of Vice-Chancellor *Bacon* finding the Defendant, Mr. *Gaunt*, who was a trustee, liable to make good some £15,000 which has been lost through the failure of the stockbroker employed by him to make investments on account of the trust.

The questions which we have to decide are important not only on account of the amount in dispute, but also on account of the principles which ought to govern the Court in deciding points of this nature.

In the first place, I think we ought to consider what is the liability of a trustee who undertakes an office which requires him to make an investment on behalf of his *cestui que trust*. It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words, a trustee is not bound because he is a trustee to conduct business

(1) Amb. 218.
(2) 5 Ves. 331.
(3) 3 My. & Cr. 490.
(4) 32 Beav. 660.
(5) 2 J. & H. 259.
(6) Law Rep. 1 Eq. 26.
(7) Ibid. 11 Eq. 74.

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Jessel, M.R.

in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own. It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the business in any other way. If it were otherwise, no one would be a trustee at all. He is not paid for it. He says, "I take all reasonable precautions and all the precautions which are deemed reasonable by prudent men of business, and beyond that I am not required to go." Now what are the usual precautions taken by men of business when they make an investment? If the investment is an investment made on the *Stock Exchange* through a stockbroker, the ordinary course of business is for the investor to select a stockbroker in good credit and in a good position, having regard to the sum to be invested, and to direct him to make the investment—that is, to purchase on the *Stock Exchange* of a jobber or another broker the investment required. In the ordinary course, all that the broker can do is to enter into a contract—usually it is for the next account-day. Of course you may, by special bargain, make it for cash or for any other day, but the ordinary course is for the next account-day. Before the account-day arrives the purchasing stockbroker requests his principal to pay him the money, because on the account day he is himself liable to pay over the money to the vendor, whether a jobber or broker, and therefore he must have it ready for the account-day, and according to the usual course of business he sends a copy of the purchasing note to the principal stating when the money is required to be paid, and he obtains the money from him a day or two before the account-day. When he gets it he pays it over, if it is a single transaction, to the vendor, and if it is one of a number of transactions he makes out an account with his vendor and pays over or receives from him the balance on the transactions. It by no means follows, therefore, that he pays over to the vendor the sum received, indeed there may be a number of transactions, and if the balance is the other way, then he has to receive money on the account, but he must in any case have the money in order to keep himself out of cash advances. It is after payment, and very often a considerable time after payment, that is several days, that he gets the securities perfected. If they are

shares or stock in a company, or railway or other company, it may be a considerable time before the transfers are lodged at the office, and it is not until the matter is ready for completion that he gets the transfer and the certificates. But in all cases, except in the case of consols and a few other such stocks, there is some interval between the payment of the purchase-money and the obtaining of the security, or of the investment purchased.

If, therefore, a trustee has made a proper selection of a broker, and has paid him the money on the bought-note, and, by reason of the default of the broker the money is lost, it does not appear to me in that case that the trustee can be liable. Indeed it was not argued in this Court that he would be liable, and I have said what I have said upon the subject more on account of an observation reported to have been made by Vice-Chancellor *Bacon* in the Court below, than because of any argument that was addressed to us upon the point.

Having said what I have said on the general principle, I think it right to call attention to the authorities upon the subject, in order to shew that I have given the fair result of the authorities as they stand. There is, in the first instance, the case of *Ex parte Belchier* (1). It was before Lord *Hardwicke*, and it is the leading case upon the subject. There it was the assignee of a bankrupt, but the same principle applies to the assignee of a bankrupt as to a trustee. A large quantity of tobacco belonged to a bankrupt, and the assignee employed a broker to sell it, the money was paid to the broker, and ten days afterwards he died insolvent. The commissioners fixed the assignee with the loss. He appealed to Lord *Hardwicke*, and it was proved that it was the common practice to sell mercantile goods by auction, and to employ a broker, and for him to receive the money. That was the ordinary course of business. It would be the same thing if a trustee sold goods by auction, the auctioneer would receive the money, and as regards certain transactions an auctioneer is called a broker. Lord *Hardwicke* says: "If Mrs. *Parsons* is chargeable in this case, no man in his senses would act as assignee under commission of a bankrupt. This Court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to

(1) Amb. 218.

C. A. 1883 ~~ *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Jessel, M.R.

strike a terror into mankind acting for the benefit of others, and not for their own." He says, "not to strike a terror into mankind"—it is rather rhetorical, but he means not to discourage respectable people from accepting the office of trustee. Then he says: "Courts of law, and equity too, are more strict as to executors and administrators." I must say I do not concur with this observation. I think in modern times the Courts have not distinguished between assignees, executors, and trustees, but they have put them all together and considered that they are all liable under the same principles, but that is only a bye point. Then Lord *Hardwicke* goes on to say: "But where trustees act by other hands, either from necessity or conformably to the common usage of mankind, they are not answerable for losses." That of course means where they act by other hands and properly choose the hand by which they act. Now what is meant by "either by necessity or conformably to the common usage of mankind"? It means where in the ordinary course of business transactions an agent is employed. A gentlemen, for instance, who has rents to collect as a rule employs a rent collector. He might go round himself and collect them, but he does not do so. It is the common usage of mankind in such a case to employ an agent to do it. So a man who buys stock on the *Stock Exchange* employs a stockbroker, and there it is absolutely necessary for him to do so; he cannot buy himself, but even if he could it is usual to employ a stockbroker. Then Lord *Hardwicke* goes on: "Secondly—Moral necessity, from the usage of mankind. If a trustee acts as prudently for the trust as for herself and according to the usage of business. If a trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable. So in the employment of stewards and agents; the receiver of Lord *Plymouth's* estate took bills in the country, of persons who at the time were reputed to be of credit and substance in order to return the rents to *London*. The bills were protested and the money lost, and yet the steward was excused. None of these cases are on account of necessity, but because the persons acted in the usual method of business." Then he answers a little further down the objection that Mrs. *Parsons* herself might have received the money. The answer is that it is not usual to receive

the money oneself. Then he says: "A question frequently happens by reason of bankruptcy as to goods, which are shipped but not imported, to whom they belong. In those cases this Court generally orders the goods to be sold and the money paid into the bank, for the benefit of the parties who shall be entitled in the event. But yet the broker is the hand to receive the money first." Then there was an objection that "she might have taken security, but to do that on every occasion would tend greatly to the hindrance of business." That seems to me to go the whole length we are required to go here and to establish the general principle.

The case which I shall next refer to is the case of *Bacon* v. *Bacon* (1), and is a decision of Lord *Loughborough*. There an executor was sought to be charged for lending money to his co-executor to pay debts. The fact of the man being co-executor was not considered to be material. The question was whether it was a reasonable thing to leave the money in the hands of the co-executor to pay the debts. Lord *Loughborough* said this (2): "Supposing *Kirby* had not been co-executor, but that the executor living in *London*, and receiving money of the testator's, had remitted it to the attorney of the testator to pay the debts, could he have been liable?" That is he had to send it up from the country to pay the debts in *London*, and he must send it to somebody. "*Kirby* was in no insolvent circumstances. He was a man in business at *Ipswich;* had been the attorney of the testator (I take him no higher than that); was acquainted with all his affairs; had his accounts in his hands, and the first payment was three weeks after his death. In the ordinary management of executor how was he to pay the funeral expenses and the number of small debts appearing upon the books of the testator without sending the money? The payment is made by the defendant only because he happened to have money of the testator in his hands at the time. If the business was transacted in the ordinary manner, unless there was some circumstance to awaken suspicion, surely the allowance is fair. Suppose he had paid the money into the hands of his own clerk, and the clerk had run away. *Kirby* could not prove the will. Supposing he had, what

(1) 5 Ves. 331. (2) 5 Ves. 334.

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Jessel, M.R.

would have been the difference? The mention of him in the will adds to the confidence the testator may be supposed to have in him as an attorney of credit in the town. By proving he would not have been more worthy of trust than by the nomination the testator had made of him as executor. It would have been only a difference of character, but would not invest him with more authority." In other words, Lord *Loughborough's* view was this, that where you must necessarily employ an agent, or where you might reasonably in the ordinary course of business employ an agent, and you use due diligence in the selection of your agent, you are not liable for the consequences. You have only conducted the business in the way an ordinary prudent man of business would have done.

The next decision I shall refer to is the decision of a late Lord Chancellor (Lord *Redesdale*) in the case of *Joy* v. *Campbell* (1). He first of all says that if the executors join in a receipt without necessity they are both liable, and then he says, "But this does not apply to what is done in the discharge of a necessary duty of the executor; for example, an executor living in *London* is to pay debts in *Suffolk*, and remits money to his co-executor to pay these debts, he is considered to do this of necessity. He could not transact business without trusting some persons, and it would be impossible for him to discharge his duty if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way. It would be the same were one executor in *India* and another in *England*, the assets being in *India*, but to be applied in *England*; there the co-executor is appointed for the purpose of carrying on such transaction; and the executor is not responsible, for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence." That is a mere question of selecting an agent. Of course although the testator reposed confidence in him something else might happen afterwards, the man might become insolvent, or the like, it does not mean that, but it is an additional reason that a man who was in good credit at the time was actually named as executor by the testator.

(1) 1 Sch. & Lef. 328, 341.

There is only one other case that I will refer to, and that is the case of *Clough* v. *Bond* (1). There Lord *Cottenham*, after speaking of the nature of the loss and remarking that a trustee is not liable for loss occasioned by an authorized investment, goes on to say: "So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property he will be liable, although the person possessing it be a co-executor or co-administrator." The value of that statement of the law is that he says, "Necessity, which includes the regular course of business in administering the property," interpreting the word as being nothing more and nothing less than the regular course of business. It appears to me, therefore, that it is clear and settled law, and Mr. *Millar* was quite right in not contesting it, notwithstanding the remarks which had fallen, I think *per incuriam*, from the learned Judge in the Court below as to this part of the case, that if it was an ordinary purchase on the *Stock Exchange* a trustee could not be liable for the failure of the broker provided that the broker was in good credit at the time and there was no circumstance to excite suspicion brought to his knowledge which ought to induce him to distrust the broker.

I now come to the point upon which the case was decided and on which it was argued before us. I must say as I read the pleadings that the law is stated in conformity with that which I have been laying down. The accusation against the trustee is one of negligence. It is called "gross negligence," that does not matter, negligence is the charge made against the trustee, and the question is whether he has been guilty of negligence. Now where you have, as you have in this case, an innocent man—that is innocent at any rate as to any moral guilt—who was sincerely anxious to do his best for the trust fund, and as to whom, as was stated by the Vice-Chancellor in the Court below, there was really nothing that he could be reproached with unless it were carelessness, I think the Court is bound to look carefully at the pleadings

(1) 3 My. & Cr. 490, 497.

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Jessel, M.R.

to see what he is charged with, and not to allow the charge to be extended beyond the pleadings. I shall not decide the case upon that ground, because, as will be seen presently, even if I had thought the Plaintiffs were at liberty to go beyond the pleadings, I should come to the same conclusion as I have upon the pleadings.

Now the Vice-Chancellor said this about Mr. *Gaunt*, in which I think he was fully justified, and I merely quote it to shew that my view of these cases against trustees is rather corroborated by the observations which I am about to read. My view has always been this, that where you have an honest trustee fairly anxious to perform his duty and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done and which he believes is right in the execution of his duty, without you have a plain case made against him. In other words, you are not to exercise your ingenuity, which it appears to me the Vice-Chancellor has done, for the purpose of finding reasons for fixing a trustee with liability; but you are rather to avoid all such hypercriticism of documents and acts and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him.

23 Ch D 495

I think it is the duty of the Court in these cases where there is a question of nicety as to construction or otherwise to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. You are to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man who is not paid for the performance of an unthankful office liable for the failure of other people from whom he receives no benefit. I think that is the view which has been taken by modern Judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation. It appears to me that the Vice-Chancellor has adopted an entirely different view. I think he has inferred that which is not fairly to be inferred in this case; and even if he were right it could only be inferred by taking one of two views, and we ought not to take the adverse view if the other view, being equally as good, can be adopted.

C. A.
1883
In re
SPEIGHT.
SPEIGHT
v.
GAUNT.
Jessel, M.R.

Now the way in which it is put by the statement of claim is this. It appears that there was a broker of the name of *Cooke*, who was a young man who had come into his father's business, who had also been a stock and share broker at *Bradford* in a considerable way of business. Young *Cooke* had not been very long in business, but for upwards of three years he was a man of good credit and large business at *Bradford*. There is another circumstance about his position which I must mention, although I do not think it would exonerate the trustee—the family for whom Mr. *Gaunt* was trustee were some people of the name of *Speight*, and the *Speights* were friends of *Cooke*, and one of the *Speights*, the son, naturally asked Mr. *Gaunt* to employ *Cooke*. It does not matter much, because if Mr. *Cooke* was not in good credit Mr. *Gaunt* ought not to have complied with the request, and therefore it does not really from a moral point of view affect the transaction; Mr. *Gaunt* would be liable if he had employed an improper broker, although he had done so by the wish of the *Speight* family. However, it is a remarkable circumstance that Mr. *Gaunt* did not employ his own ordinary broker, but did at the request of the *Speight* family employ this gentleman, who was, as I have said before, as far as was known, a fit person for Mr. *Gaunt* to employ; he was employed to sell the property, the proceeds of which were to be afterwards reinvested, and he did sell, as I gather, some £13,000, and paid the money into the bankers; so far it was all right. Then they had a sum of upwards of £15,000 to invest, and the question was how it was to be invested.

The matter was considered by Mr. *Gaunt*, and he thought the best way of investing it was to invest it in three sums of £5000 each in the purchase of corporation bonds, as we generally call them, debentures, or debenture stock, as they are called in the documents. It seems that they had £6000 invested in *Bradford* debenture bonds or debentures, and therefore he would not have any more of *Bradford* securities, and he suggested it would be well to divide them into three, and to make the remaining investments in *Huddersfield*, *Leeds*, and *Halifax*, being large towns, and in good credit, and there was no objection whatever to the securities selected. Whether they were debentures or debenture

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Jessel, M.R.

stock is not material—they were very good securities—and indeed Mr. *Gaunt* says he does not know whether they were debentures or debenture stock, but they were bonds of these corporations. Then how was he to get them? We read from the statement of claim that there are two ways of getting them, one way is going to the corporation, and asking them to take a loan, and to issue debentures or debenture stock, if they have power to issue debenture stock, and on this occasion it appears to be the practice (I am taking it from the statement of claim), that if a person employed a solicitor or broker, the solicitor's commission or the broker's commission is paid by the corporation. They find it to their advantage to do so, and they do it; but of course it may happen that you can buy these securities on the *Stock Exchange*, for the lenders may die, or the lenders may want the money before the debentures are repayable, or if it is debenture stock, it would not be repayable at all, and upon those occasions they would sell their securities on the *Stock Exchange*. It appears from the statement of claim that occasionally these securities do come on the *Stock Exchange*, and are bought there. That is stated at page 5 of the statement of claim, where it is said "debentures are occasionally and debenture stocks are frequently the subjects of purchase and sale, and in such cases a broker is usually employed." Of course it may happen, and it did happen, as we find by the evidence, that in the case of a large town like *Leeds*, the quantity of debentures or debenture stock being very great, there is a regular market for them, and you can always buy them, but in the case of *Huddersfield* and *Halifax*, being smaller towns, that is not so, and there appears to be no regular market for them. If you want them at all as a general rule you must go to the corporation to get them, although there may be some for sale privately. That being the position of things, Mr. *Gaunt* instructs *Cooke* to procure these three sums of £5000 each, he did not tell him how to get them, he told him to procure them. Mr. *Cooke* on the 24th of February brought a document, which has been the subject of a great deal of comment, to Mr. *Gaunt*, and that is the only allegation in the statement of claim. There is no allegation in the statement of claim, although it has been argued, that Mr. *Gaunt* ought not to have employed a broker. I dismiss that

argument at once. It is quite plain that he was entitled to employ a broker in the ordinary course of business, whether the purchase was on the *Stock Exchange*, or whether the securities were to be obtained from the corporation. The advertisements not only authorized the employment of a broker, but offered to pay the brokerage, and there was no occasion for a gentleman who was a trustee to do that himself which might properly in the ordinary course of business be done by another, and especially where the cost of employing that other would not fall on the trust estate. I think, therefore, that he was entitled to employ a broker even if he could have obtained the securities from the corporations direct. But there is no allegation in the statement of claim that he ought not to have employed a broker. It only states the fact of this bought-note, it being received by him on the 24th of February, 1881. Now it was alleged in the argument both here and in the Court below, and the allegation was adopted by the Vice-Chancellor in his judgment, that the receipt of this bought-note informed Mr. *Gaunt* that the stocks in question were to be obtained direct from the corporations. There was some evidence before the Vice-Chancellor to lead to that conclusion. There was the evidence of experts who gave it as their opinion that there was an omission in the bought-note which ought to have aroused suspicion. Now I must say that there is no allegation in the statement of claim that Mr. *Gaunt* knew that these securities were to be obtained direct from the corporations, the only allegation being that he received the bought-note, and the true interpretation of that bought-note was not such as to give him information as to buying the stocks of the corporations. In my opinion it was not regular or proper to go into evidence against him to shew that he knew it, there being no allegation of knowledge except that to be derived from the interpretation of the bought-note; but Mr. *Gaunt* says he did not know it, and in my opinion on the balance of testimony it is not proved that he did know it. Therefore if there had been that allegation I should have held it not proved.

I now come to the bought-note itself, and I will make one observation, although it is not strictly in the statement of claim. It appears in evidence that Mr. *Gaunt* had made an agreement

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Jessel, M.R.

that he was to have a net price—that he was not to pay any commission to the broker, but the broker was to get it from the other side, he was to have a net price, and it appears in the evidence that that is a very common course in country cases, because people in the country do not like an indefinite charge even of a small amount, they bargain for a net price, and that explains what appears in the bought-note.

The next thing I have to consider is the meaning of the bought-note. I do not rely on the expression "bought note," as used in the statement of claim. You do not call a thing a bought-note which is an expression of a contract or loan made by a corporation. But apart from that, let us see what it is.

[His Lordship read the bought-note as stated above, and continued:—] I must say it being for the Court to construe that instrument, to my mind it would convey but one impression, namely, that the broker had bought these things for the purchaser on the *Bradford Exchange*, subject to the rules of the *London Stock Exchange*. With the greatest possible respect to the Vice-Chancellor, it appears to me that that only can be its meaning. "We have this day bought for you as per your order, subject to the rules of the *London Stock Exchange*." I have looked with some curiosity at the evidence to see how it was possible to arrive at any other conclusion as to the meaning of the document. When we come to look at the evidence, we find there are experts who say it does not mean what it says, "bought," but it does mean "agreed to lend to these corporations;" that first of all there is no account-day named. That is true, although it is bought for the account, it does not name the day, and, no doubt as a general rule, the date is named. But we must recollect it is not a document issued by third persons; it is a document issued by the broker, and it appears in the evidence of Mr. *Gaunt* that he was told that the pay-day, which was the material point, was the next day, so that the only materiality was that the broker who brought him the note did not fill up the 25th of February in the note itself, but he told him that he wanted the money on the next day. I cannot conceive that that makes any difference as to the construction of the document. The omission to put in the account-day no doubt was an omission which would apparently have been noticed

by some persons, but if the man who brings it says, " I want the money to-morrow " (for that is what the evidence comes to), it is really nothing more than this, that he did not put it into the note itself, because he gave the information personally.

Then there is another witness who says, " I see no commission, and if a broker had bought on the *Stock Exchange* he would have charged his commission." The answer is, so he would if it had not been to buy net; because on the face of it it is net. He makes a special bargain that he is to make a net price at the time, and therefore he would add his commission to the stocks at such a price in order to make the amount up. That gets rid of any notion that the document tells you he had not bought it. It cannot be said for a moment that you can control the plain language of the document by any such outside things as those. The experts say that the word " bought " has a technical meaning, and does not mean " bought," and this is a case in which they from their expert knowledge would come to a conclusion that there was a mistake in the language of the note, that the word " bought " should not have been " bought " but should have been some other word. It does appear to me that there is no evidence which is admissible to contradict the plain construction of the document itself, and the meaning of the document is a statement by the broker to the principal that he had bought these debenture stocks. Now, if that were so what is a trustee to do? It is suggested that he might have inquired whether the broker had actually bought them. Of whom was he to inquire? Is it tolerable that a man should so far be bound to suspect his own broker as that he should be compelled to go on the *Stock Exchange* to find out from whom his broker had purchased, and then to inquire of him? Would it not be that the trustee would be informed by his broker, " You treat me like a thief, I will have nothing more to do with you?" It is quite plain that no man in the ordinary course of business ever does anything of the kind. He may or may not know the name of the stockbroker from whom the security has been purchased. He must trust his broker for bringing him a genuine contract. It is not for him to go on the *Stock Exchange* and inquire whether his own broker has sent him in a fictitious note or not. It is quite out of the

C. A. 1883 *In re* SPEIGHT; SPEIGHT *v.* GAUNT. Jessel, M.R.

question that he is to be liable for not inquiring whether there was or was not a genuine contract. He must rely in the ordinary course of business on the statement of his broker, and pay the money to him on that statement. Well, that being so, I cannot see any ground whatever for saying that Mr. *Gaunt* was guilty of negligence.

Then there is this allegation in the statement of claim, that no bonds or debentures were given by Mr. *Cooke*. Of course there were not. Then it goes on to say that no such securities as debenture stocks of *Huddersfield* and *Halifax* exist. Does that matter? I think not. It is quite true the representation was that there were such, and I think that that is the fair reading of it. But supposing it were so, Mr. *Gaunt* did not know it—perhaps he did not know the difference between debentures and debenture stock; he instructed Mr. *Cooke* to procure not debentures or debenture stock, but corporation securities, and he left to Mr. *Cooke*, of course, to ascertain what they were; but if Mr. *Cooke* represented to him that he bought debenture stock how was he to find out that these particular corporations had no power to issue it, or that one of the corporations had power and the other had no power. How is a man to find out whether a railway company or a corporation or any other company has debenture stock except by instructing his broker or some other agent to inquire? I repeat therefore, that when Mr. *Cooke* told him that he had bought debenture stock he would make no further inquiry as to whether such things existed or not—he would assume in the ordinary course of business that the securities did exist, and if he were entitled to trust his broker in the ordinary course of business he was entitled to trust him to the extent of that representation. It appears to me, therefore, that the fact of the non-existence of some of the securities has no bearing upon the question.

Then, that being so, we come to consider the further allegation in the statement of claim, "Even if the pretended purchase by the said *R. E. Cooke* had been real and *bonâ fide* there would not have been any necessity for the Defendant *Gaunt* to part with the purchase-money of the debenture stocks or any part of it on the 24th of February, 1881, or in fact at any time, without receiving in exchange proper transfers of the stocks purchased or certificates

of the ownership thereof. On a purchase of stock, and particularly on a purchase of the magnitude and character represented to have been made by the said bought-note, it is unusual and unnecessary to pay for the stock on the day of the date of such bought-note, or until the purchase is ready for completion." It was said that it was the duty of Mr. *Gaunt* to pay the money direct to the bankers of the corporation, or at all events to make the cheque payable to the order of the corporation. If it is to be assumed against him that he knew the stocks were to be acquired from the corporations direct, I do not say whether or not he ought to have paid the broker. I reserve my opinion upon that question. If it were not so, if he had neither notice nor knowledge that the stocks were to be procured otherwise than on the *Stock Exchange*, then I think the argument that he might have paid it through the bankers falls to the ground. In the first place, as I said before, the usual custom is to pay your broker, and in the next place it by no means follows that the money would ever have reached the vendor; and, indeed, in the case where the purchase is in *London*, I suppose it would go to a *London* broker, so that I cannot see either according to the ordinary course of business or according to any possible mode of conducting business you could pay otherwise. It seems to me, therefore, that if you once arrive at the conclusion that Mr. *Gaunt* was uninformed by the bought-note that the purchase had been made in that way, there was no obligation on him to make any further inquiry. He trusted his broker, and he was not bound to ask the broker whether he had written a falsehood, whether he had really entered into a contract or not. The man told him in writing that he had, and he was entitled to trust him; and, as it seems to me, there was no obligation on him to make any further inquiry.

For these reasons it appears to me that the decision of the Court below ought not to be affirmed.

I will only now quote two paragraphs from the judgment, because I think it right to say that I think that the error which I conceive the Vice-Chancellor to have fallen into very plainly appears from those passages. He says, "A trustee who takes another man's money into his hands is bound, whatever other duties he may have to discharge, to take care that that money

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Jessel, M.R.

shall be preserved, and not to deal with it or to do anything with it which a prudent and reasonable man would not do with his own money." That is a very clear statement of the law, and I have no fault to find with it. "That is the rule which is properly to be applied to this and to all such like cases. Now when I come to apply that rule to this case, can I or anybody else say that a trustee with £15,000 of other people's money in his hands should have parted with it to *Cooke* upon that scrap of paper?" Whether it is £15,000 or 15,000 pence, it makes no difference if the man is in a position to be trusted with the money. The Vice-Chancellor says, "Certainly not. The paper upon the face of it, as a witness has said, as to Mr. *Gaunt* meant, 'Your money is to go to the corporations.'" If that were right very different considerations would arise as to the mode of paying the money. That is the key to the judgment, that Mr. *Gaunt* was told by that paper that the money was to go to the corporations. I have already given my reasons for stating that to my mind it is plain the paper told him nothing of the kind. It told him, on the contrary, that the stock was bought on the *Bradford Exchange*. Then the Vice-Chancellor says, "No suggestion has been made except this, that certain stockbrokers have been called—two gentlemen of great eminence, one in *London* and one in the country,—who both say, 'It is our custom when we buy for clients to take a cheque in order that we may pay the vendor of the stock.' That may be the custom with men of their character and credit, and that may be the set custom for anything I know; but it is not a lawful custom as applicable to the state of facts I have just been describing." I have said all I have to say upon that. I do not think that that is the true version of it. I cannot understand why it should not be a lawful custom to give the money to your broker to pay for the stock, which you cannot get without the money. I cannot help thinking that there was some little misapprehension in the mind of the Vice-Chancellor, or in the mind of the counsel who supported that argument, as to the expression used. There is nothing unlawful or unreasonable in it. You cannot get the stock on the *Stock Exchange* without dealing with a broker. Then the Vice-Chancellor says, "I cannot adopt it as a rule of law establishing a custom that if a man

employs a broker and takes from him a sale-note, he is thereupon at liberty to pay to that broker the price of the thing bought." It appears to me that the law is exactly the other way. Where it is the ordinary course of business it is lawful for a trustee to pursue that course which he would pursue in investing his own money.

There is only one other remark I have to make upon the case, and that is this. There is an allegation in the statement of claim, and there was some slight argument addressed upon it, that the broker having failed on the 28th of March, Mr. *Gaunt* should have done something in the interval to get the money back. There is really no evidence that if after the money was paid Mr. *Gaunt* had asked for security he would have got it; and, indeed, I am quite satisfied that he could not have got the money if he had brought an action or taken any proceedings at all. The only suggestion is that some other creditor who pressed Mr. *Cooke* got a sum of £3000 out of him. Mr. *Gaunt* had no reason to suspect *Cooke's* honesty, and if he had asked him for security or brought an action, as I have said before, there is no evidence that he would have got the money; but there is the most cogent evidence, to my mind, that he could not have got it, because the money was paid away immediately, most improperly, by Mr. *Cooke* in the satisfaction of his own debts. He was in that state of hopeless insolvency that no action or proceeding in bankruptcy could have resulted in any benefit, and I do not see that there is any case made against Mr. *Gaunt* for negligence, or that he had sufficient knowledge of Mr. *Cooke's* improper dealing to have induced him to take such proceedings, even if they would have resulted, which I am of opinion they would not, in getting the money back.

Therefore the appeal will be allowed. Mr. *Gaunt* will have his costs both here and below.

LINDLEY, L.J.:—

This case appears to me to be one of very great importance not only to Mr. *Gaunt* and the *cestuis que trust*, but also to trustees in general who have to invest money or who do invest money through brokers.

The first observation to be made is that this is a case in which

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Lindley, L.J.

the trustee is not even accused of having acted in any way with a view to his own benefit, or otherwise than with perfect *bona fides* and honesty, a remark which of course is important, because one approaches such a case in a different state of mind from that with which one would approach a case if one were dealing with a dishonest trustee.

The next remark is that the trust for investment was so worded that nobody pretends that the investment of the trust property in debentures or in debenture stock of these corporations was not within the investment clause. It is not suggested that it would be a breach of trust on the part of the trustee in this case to invest the trust money in that kind of securities in which he directed the broker to invest it.

Now what the trustee did in this case was this. Some of the trust moneys to the extent of £13,000 had been paid over, and in that transaction Mr. *Cooke*, I understand, had been employed. He was the family broker. He was not the broker whom Mr. *Gaunt* generally employed in his own business, but he was a person recommended by the family. I do not attach much importance to that, but it is a circumstance which should, I think, be mentioned. Mr. *Cooke* at the time was a broker in good repute. He was a person to whom an ordinary prudent man desiring to employ a broker in *Bradford* would have recourse. Then Mr. *Gaunt*, being desirous of investing £15,000 in debentures or securities of these corporations, intrusts Mr. *Cooke* to make the investment.

The first point that occurs to my mind is this, Was it proper for the trustee to employ Mr. *Cooke* in the transaction at all? because if it was not I take it that the trustee must be responsible for the consequences. A trustee has no business to cast upon brokers or solicitors or anybody else the duty of performing those trusts and exercising that judgment and discretion which he is bound to perform and exercise himself. On the other hand, a trustee is not bound to do everything himself. A trustee is entitled to employ brokers and solicitors to do that which in the ordinary course of business other people would employ brokers and solicitors to do.

The real importance of this case is, that it lies between these

two propositions—that a trustee cannot delegate his trust, and that, on the other hand, he is entitled to employ persons to do that which an ordinary man of business would employ an agent to do. Now, looking at the matter fairly and properly as a business man would look at it, can it be said to be an improper thing on the part of a trustee who is desirous of investing £15,000 in this class of securities to go to a broker? That he might have acted otherwise is plain enough; but was it a reasonable and proper thing not to apply to the secretaries or treasurers of these corporations, but to employ a broker for that purpose? So far as the evidence goes, it appears to me that on the balance of the evidence it is impossible to say that this was an improper step for a trustee to take. Although business men can do these things for themselves, unless we can go the length of saying that the employment of Mr. *Cooke* was an improper delegation of the trust or an improper employment, it will follow that it was not an unreasonable thing or a breach of trust to employ a broker to do this kind of work; and the conclusion that I have arrived at on that point is that we cannot say the trustee, acting honestly, was not entitled to employ a broker to do this kind of business.

Then the next thing is, what did Mr. *Gaunt* employ Mr. *Cooke* to do? He employed him to invest this money in these securities. He did not tell him or suggest to him how it had better be done, he did not know, and I do not think he was bound to ascertain, whether these securities were in the market in the ordinary commercial sense, or where Mr. *Cooke* was to get them from; he left that to Mr. *Cooke's* discretion, and I think he was not guilty of negligence in so doing. Mr. *Cooke* told him he would get them for him. There had been apparently some discussion as to the class of bonds, Mr. *Gaunt* preferring to have *Halifax* bonds, and although Mr. *Cooke* said there would be some difficulty about *Halifax* bonds, the result is that he comes to Mr. *Gaunt* and says that he has got them, that is, that he has got £5000 *Halifax* corporation debenture stock. I do not attach much importance to the distinction pointed out between debentures and debenture stock. The substance of the thing is that what was wanted was securities of these corporations, whether debentures or debenture stock. Nothing turns upon that so far

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Lindley, L.J.

as I can see. Mr. *Gaunt* would have been satisfied with either, and either would be within the trust.

I now come to the bought note, which is a very important document, and I confess I cannot look at it from the same point of view as Vice-Chancellor *Bacon* did. The bought note is a printed form, filled up, of course, with a pen. Judging from the words of the document, and from the appearance of it, and bringing to bear upon it the knowledge which every one has of the ordinary transactions of business, I confess this document would have completely misled me. I could not possibly, looking at it with the utmost care and vigilance, such as an ordinary man would exercise, extract from this document the slightest information or notice that this was a purchase other than in the ordinary course of business upon the *Stock Exchange*. If it would mislead a person like myself, why should it not mislead others? I am quite aware that experts have been called who say that, to their experienced eyes, there are signs on this document which indicate, to them at any rate, irregularities; but the question is not whether experts like brokers or those who are accustomed to deal in these things see irregularities; the question is, whether these signs of irregularity are such as would attract the attention of an ordinary prudent man of business.

There is no irregularity of that sort at all in it that I can discern. It is a question of fact, and not a question of law, whether upon the face of this document there are or are not such signs of impropriety as to excite the suspicion of anybody. Nobody suggests any, except that the experts say there are signs which would put them on inquiry.

Now the signs which are visible to them are apparently these: first of all, the absence of the name of the selling broker, of which I do not think much; and, secondly, the fact that there is nothing charged for stamps or commission, and no date for the settlement of the account. The absence of a charge for commission is explained by the fact that in the commission column, the word "commission" being in print, under it is written "nett," that is to say that the purchase was to be for a nett price. Then it is said that the word "account" being printed, it ought to have been followed by a date, and that a broker would look with suspicion

on a document with the word "account" in it not followed by the date. I do not pretend to say that there are not signs of suspicion to the eyes of a broker, but we are not looking at it with the eyes of a broker. We are looking at this document with the eyes of ordinary men of business, and there is no evidence to show that there is anything which would lead an ordinary man of business to suppose there was anything wrong. I am not able to come to the conclusion that Mr. *Gaunt* was put on inquiry, or ought to have been put on inquiry, as a reasonable and cautious man. If anything was calculated to lull suspicion in his mind, this document was, in my opinion, calculated to do so. That he was deceived is plain enough upon the evidence, but I cannot see that blame is to be imputed to him for not suspecting that there was something wrong. Upon this point, and it is a question of fact not of law, I differ from the Vice-Chancellor, who seems to have been more impressed than I am with the evidence of the experts, and to have looked at this paper with the eyes of an expert, and too little with the eyes of an ordinary man of business.

Now, assuming that the trustee was justified in employing Mr. *Cooke*, and assuming that he was not negligent in not having his suspicions aroused when this document was brought to him, the next question is, was he acting improperly in paying the purchase-money to the broker? That is to say, ought he, as a prudent man of business, to have paid it to somebody else, namely, to the principals from whom the broker ought to have got, but did not get, these securities, whether upon the *Stock Exchange* or otherwise? If the trustee had notice, and really did know that these things had not been bought on the *Stock Exchange*, it is quite possible that he ought so to have paid it. I say nothing about that. It might be that in that case the trustee would be bound to see further into the application of the money; but, misled as he was, and entitled as he was to treat these things as bought by the broker in the ordinary way of his business as a broker on the *Stock Exchange*, it appears to me that it is perfectly impossible to hold that he was bound to see to the application of the money, in the sense that he was bound to pay the persons with whom the broker negotiated the purchase. We know the way in which business is done through brokers in buying ordinary stock.

C. A. 1883

In re SPEIGHT. SPEIGHT *v.* GAUNT.

Lindley, L.J.

If a broker buys £10,000 of stock there are sometimes half a dozen people from whom he gets the stock. It is not in the ordinary course of business for a buyer, whether a trustee or not, to pay to persons from whom the broker has bought; he pays the broker. He is entitled to do that by the ordinary course of business. I do not myself understand that there is any evidence that, in point of fact, a trustee or any other person employing a broker to buy could do it in any other way. As a matter of business I believe he could not. At all events, the evidence is conclusive that the ordinary practice in employing a broker on such occasions is to send a cheque to the broker. There was, therefore, no negligence in Mr. *Gaunt* doing so; there was no impropriety or breach of trust in his conduct up to this point.

Then if we look a little farther, we shall see how the matter was done. Mr. *Gaunt* did not find out, nor could he by reasonable diligence have found out anything which would lead him to stop his own cheques. If anything could be brought home to him to shew that he was negligent in not stopping his cheques the case would have been quite different; but there was nothing to justify him in doing so, there was nothing sufficient to excite his suspicion.

Then it is said that there was negligence in not getting the securities. If the ordinary course of business had been that the securities should be exchanged for the cheques, of course it would be different; but that is not the ordinary course of business. You pay the broker and he gets you the securities. He sees to all that. That is the ordinary course of business. It is very true that the broker did not fail for three weeks or a month afterwards, but so far as the evidence goes it seems to me clear to demonstration that no discovery Mr. *Gaunt* could have made after the cheques were cashed could have saved the property. If he was not negligent in not looking after the matter during the month, I do not see that the lapse of time or the so called negligence caused the loss. The loss was anterior to that negligence, if negligence there were. I have made these observations in consequence of the passage that has been read from the judgment of the late Lord *Hatherley* in *Mendes* v. *Guedalla* (1). I have looked

(1) 2 J. & H. 259, 8 Jur. N.S. 878

at the case since it was cited, and it appears to me, having regard to the facts which were before the Court, that the passage which was read does not go to the length contended for, so far as I can understand it. In that case there was negligence in not looking after the securities, the negligence was long continued, and but for that negligence and if inquiry had been made the securities might have been got back. The charge there was that the trustees trusted the agent for several years, and that they put the securities in a box and never asked anything about them. There is no doubt that in that case there was not only negligence, but the evidence was such as to shew that but for the negligence the loss would not have been incurred. As to Mr. *Gaunt* not asking for and not getting these securities, the time was short, and the misappropriation of the fund had taken place, and I am satisfied myself that the loss would have been sustained all the same if he had asked for them. In other words the cause of the loss was not the want of inquiry by Mr. *Gaunt*, but the fraud which was practised upon him.

Now I do not propose to go through the authorities, but I will advert to two cases, because they have been brought to the attention of the Court and they require notice. One is *Bostock* v. *Floyer* (1), in which Lord *Romilly* held that a man was responsible for the sum of £400 which he had given to his solicitor to invest. The solicitor had pretended to invest it on a mortgage of some copyholds, but he had not done so, and the money was lost, and the trustee was held responsible. As I understand it the *ratio decidendi* of the case was this, that it was not the ordinary course of business for a trustee to place money in the hands of a solicitor to invest. It was not a specific investment, it was handed to the solicitor, and in that point of view the case is intelligible enough upon the ground that it was not right for the trustee to hand over the money to the solicitor for the purpose of investment. The other case was *Hopgood* v. *Parkin* (2), cited by Mr. *Millar*. That case certainly goes much further than I should have thought right; but in the result the case was appealed. An infant was concerned, and the Court of Appeal sanctioned a compromise on behalf of the infant.

(1) Law Rep. 1 Eq. 26. (2) Law Rep. 11 Eq. 74.

C. A.
1883
In re SPEIGHT.
SPEIGHT *v.* GAUNT.
Lindley, L.J.

I wish most emphatically to say that if trustees are justified by the ordinary course of business in employing agents, and they do employ agents in good repute and whose fitness they have no reason to doubt, and employ those agents to do that which is in the ordinary course of their business, I protest against the notion that the trustees guarantee the solvency or honesty of the agents employed. Such a doctrine would make it impossible for any man to have anything to do with a trust. I differ from the Vice-Chancellor upon the question of fact: the principles of law, which he stated in the first part of his judgment are entirely sound, but I differ from the conclusion at which he arrived on the bought-note, and so differing from him I cannot agree with the judgment which he pronounced.

BOWEN, L.J.:—

This is a case of the greatest possible importance, and I think it right, therefore, to add my own expression of opinion to the judgments which have been already given, not merely because of the importance of the case, but because during a portion of the arguments I certainly did not feel quite so clear as the rest of the Court appeared to do—not as to the law, which has throughout been admitted on all sides to be open to no doubt, but as to the correct inference from one particular point to be drawn by the tribunal that has to decide the case. However, I have come to a decided opinion about the matter, and as I have done so I think it is as well that I should express fully what that opinion is.

Now, with regard to the law it is clear that a trustee is only bound to conduct the business of the trust in such a way as an ordinary prudent man of business would conduct his own. I agree with what was said by the Master of the Rolls in the opening part of his judgment, and the cases which he has cited seem to me to be conclusive upon the point. The truth is that the law upon the subject is clear, because it is based upon common sense. A trustee cannot, as everybody admits, delegate his trust. If confidence has been reposed in him by a dead man he cannot throw upon the shoulders of somebody else that which has been placed upon his own shoulders. On the other hand, in the administration of a trust a trustee cannot do everything

himself—he must to a certain extent make use of the arms, legs, eyes, and hands of other persons, and the limit within which it seems to me he is confined has been described throughout, both in the cases which have been referred to and the judgments which have preceded me, to be this—that a trustee may follow the ordinary course of business, provided he runs no needless risk in doing so. That is in substance what was laid down in the case before Lord *Hardwicke* of *Ex parte Belchier* (1). Lord *Hardwicke's* view, putting aside peculiarities of language, is based upon reason and common sense. In other words a trustee may not employ an agent where he should do the work himself; but he may employ an agent where there is a moral necessity, adopting the form of expression used in that case, that he should use the instrumentality of others, that is to say, he may use others if it is in the ordinary course of business to use others, and if he runs no needless risk in doing so. A similar sort of test is applied every day by commercial men in the business world to transactions which are carried on through agents. A contract of agency, a contract which a man makes with his agent when he commits anything to his hands is to a certain extent a personal one, and to the extent to which it is a personal one it cannot be delegated; but everybody knows that nothing is more common—nothing is more certain than that a large portion of commercial business is performed through sub-agents. It is entrusted to the hands of an agent, not to do it himself, but to get it done, and in that class of cases, provided the agent chooses carefully the sub-agent, he really discharges the functions he is employed to discharge, and the proposition as to trustees or agents, that they cannot delegate, means this simply—that a man employed to do a thing himself has not the right to get somebody else to do it, but when he is employed to get it done through others he may do so. Now, applying that sort of reasoning to the present case, I begin with this, that a trustee who employs a broker to buy in the ordinary course of business on the *Stock Exchange* is justified in employing and in paying money to the broker whom he has employed. I fail to see what a trustee could be expected to do different. When the time comes for the completion of the purchase, the broker wants

(1) Amb. 218.

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Bowen, L.J.

the money, and the payment to the broker is therefore one of the means of effectuating the completion of the purchase. It is wanted for that purpose. There is a moral necessity for it.

Now what are the facts of this case, and is there any ground for saying that a distinction ought to be made between this case and such an ordinary case as I have described? *John Speight* left certain trust funds by his will and the trustees had power to invest them in corporation securities. It was determined after due consultation that such investment should be made. Now these corporation securities are securities which may be in the nature of debentures or in the nature of debenture stock. They may be, and in the first instance of course must be, created by the act of the corporation—whether purchase is the exact definition of the transaction or not I pass over for the moment—but the person who wishes to obtain the corporation's securities may either get them from the corporation direct, provided they are issuing them, or he may get them by purchase from some other person. It appears in the case of these corporation securities with which we have been dealing, that some of them were, and some of them were not, upon the *Stock Exchange*. One can understand without much consideration how that might be the case. Corporations differ in the magnitude of their resources, and some corporation stocks are sold usually upon the Exchange and some only occasionally, and in the case of certain of these securities with which we have been dealing it is clear that they were not in the market in the ordinary way, but in one way or the other everybody who wishes to purchase corporation stocks or corporation securities, whether they be the security of corporations whose stock is not in the market or the reverse, is entitled to look to his broker as the person through whom to get them. In the first place, you can only find out whether they are in the market or not by asking the broker—at least that is the natural course to pursue; and, in the second place, if he can get them in the market it is much more for the client's interest to do so, because he would probably get them cheaper there than if he got them direct from the corporation. Therefore it would be perfectly wise and sensible for anybody, and therefore for a trustee, to go to his broker to see if he could get the securities upon the *Stock*

Exchange instead of purchasing them from the corporation, for even those which are not upon the market as an ordinary matter would occasionally find their way into the market in the case of the death of or transfer by the original purchaser. It seems to me, therefore, that Mr. *Gaunt* was perfectly justified as a man of sense in going to his broker and telling him, "Get the securities on the market or off the market as you find it best." That is exactly what the evidence shews Mr. *Gaunt* did.

The first question argued in the case was whether Mr. *Gaunt* was entitled to employ a broker at all. I answer the question affirmatively in favour of Mr. *Gaunt*. I think it was a sensible thing for Mr. *Gaunt* to employ a broker. As to the choice of a broker I need not say anything. Enough has been said about that. But that does not exhaust of course the points we have to decide. Assuming that Mr. *Gaunt* was right in employing a broker, was he right in paying over so large a sum as £15,000 to him? Now a payment of that sort would be wise or unwise, I should say, according to whether there existed or did not exist a reasonable necessity for it, having regard to the ordinary course of business. If it was a transaction on the *Stock Exchange*, as I have said, and the money was wanted to complete the transaction, I think the trustee, Mr. *Gaunt*, would have been justified in paying it to his broker. If the purchase of the broker was made direct from the corporation I am by no means so clear, and I feel even more doubts, if I may say so, than my brothers who have preceded me on that point. If there had been no practical necessity for paying the broker it would be a large sum to pay him, and I cannot myself see that it is made out that such a course would be conformable to the ordinary usage of mankind in the sense in which those words are used by Lord *Hardwicke* and in other cases. I should feel the greatest doubt whether Mr. *Gaunt* would be justified in paying a broker on the market if the broker made the purchase direct from the corporation, and that was understood to be the bargain. But the question whether the payment was right or wrong depending on the nature of the transaction, how was Mr. *Gaunt* to know the nature of the transaction? He could only find it out from the broker himself. He could not walk into the market and ask the

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Bowen, L.J.

persons with whom Mr. *Cooke* might be supposed to be dealing whether it was true or not that Mr. *Cooke* had made a bargain with them, nor could he be expected to write to the corporation in the first instance to know whether he was justified in trusting his own broker. Of course he was justified in trusting his own broker on that point just as much as on the other points which have been discussed. I do not see what he could have done otherwise. If that is so the question we have to answer in this case is narrowed. It really resolves itself into this, was Mr. *Gaunt* informed by the broker in effect that the transaction which had been completed was a transaction of purchase and sale upon the *Stock Exchange* in such a way that Mr. *Gaunt* was justified in believing it? Now the oral evidence in the case certainly does not shew that Mr. *Gaunt* had any reason to doubt that this was an ordinary *Stock Exchange* transaction. But I do not myself rest very much upon the oral evidence, for Mr. *Gaunt* was the only person called on this question, and it may not be right to adopt the account he has given in his own favour of the conversation as minutely as if it were the language of a marriage settlement. But at any rate I see nothing in that evidence, and I have looked most carefully into it, to help the Plaintiffs. There is nothing in it to shew that Mr. *Gaunt* was informed that this was a purchase direct from the corporation.

Then I come to the document which is the only document in the case, upon the construction of which, and upon the true inference to be drawn from which, it seems to me, we are obliged to part company with the Vice-Chancellor. I agree with the Master of the Rolls and Lord Justice *Lindley* that the cardinal hinge of the judgment of the Court below is the view taken by the Vice-Chancellor that this document would have told a reasonable person that the purchase was direct from the corporation. Now the Master of the Rolls says we must lean to the side of an honest trustee. I will pass away from that without expressing any opinion upon it. It does not seem to me when we have facts from which an inference can be drawn, that it becomes necessary to consider the question where the onus of proof lies. We have this document, and I think that any reasonable person to whom it was presented would believe that the

broker had effected the transaction upon the *Stock Exchange*. Every business man knows that it is common, or not as uncommon as it should be, for persons who are engaged in commerce continually to use a form which is designed for one thing to communicate notice of or even to effectuate another. I remember myself a case in which the whole of the difficulty, in a very important matter, arose from a circumstance of this sort. There was a sale of munitions of war to a foreign government, and it had been drawn up and effected, so to speak, by an instrument which was a form used for the sale of oils in the Levant. The difficulty arose from applying a form which was applicable to the sale of oils in the Levant to the sale of munitions of war. The true question is what Mr. *Gaunt* would reasonably believe when this was presented without any further explanation than the explanation which the document itself supplies, taken with the information also conveyed to him that the money was wanted for the payment of the broker. It is said there is upon the face of the document no charge for commission, and no charge for transfer stamps. The answer to that seems to me to be decisive, that the instructions were to purchase net. Then it is said that no date is filled in. One would expect unquestionably that the date would be filled in, and that information would be given in the ordinary way whether it was a transaction for cash or for the next account. But then admitting that, as I do to the full, and thinking, as I do, that the document may be in that respect irregular, we must not be deceived by terms. What do we mean by saying that the document is irregular in that way? The document is not something which a broker transmits as a voucher for his own assertion, any irregularity in which ought to excite just suspicion, it is an irregularity which does not point to anything irregular in the transaction itself. It is only an irregularity in the way in which the broker communicates the transaction. It is therefore an irregularity which the broker can cure himself by a word. It seems to be no more an irregularity than if the broker had forgotten to date his letter, but supplied by word of mouth the missing date. There is therefore nothing on the document to suggest, as it appears to me, that this was other than a purchase on the *Stock Exchange*. If the document

C. A. 1883 *In re* SPEIGHT. SPEIGHT *v.* GAUNT. Bowen, L.J.

were ambiguous and left that in doubt, I am not at all sure I should be satisfied with the trustee for not going further and asking about it; as it was a large sum of money, I think it would have been prudent for him if he did not get the information from his broker to have asked his broker what the transaction was. But it seems to me that the document is not ambiguous, and that is the answer to the Vice-Chancellor's judgment in the Court below, and the answer to the hesitation which I felt during a considerable part of the argument. In the first place the document begins, "We have this day bought for you," and in the second place it continues, "We have bought for you subject to the rules of the *London Stock Exchange*," and I think when a document was presented, which began in that way and which contained nothing upon the face of it to awaken suspicion, he was justified in paying over the sum of money. Whether I should have done it, or whether the Master of the Rolls would have done it, or whether Lord Justice *Lindley* would have done it, is hardly the test, because we lawyers become suspicious after hearing cases of this sort. The true test is whether a reasonable man of business would do it. I think that ninety-nine trustees out of a hundred would have done it.

With regard to what has been said as to the cases of *Bostock* v. *Floyer* (1) and *Hopgood* v. *Parkin* (2), referred to by Lord Justice *Lindley*, I entirely agree with him, and also with what has been said by the Master of the Rolls as to the subsequent alleged default in not requiring an explanation from Mr. *Cooke* of the delay which occurred after the money had once been paid.

Solicitors: *Johnson & Weatherall*, for *Rawson, George, & Wade, Bradford; Flower & Nussey*, for *Killick, Hutton, & Vint, Bradford.*

(1) Law Rep. 1 Eq. 26. (2) Law Rep. 11 Eq. 74.

M. W.

MANSEL *v.* NORTON.

C. A. 1883 Jan. 22.

[1882 M. 2599.]

Landlord and Tenant—Incoming and outgoing Tenant—Valuation of Tenant's Crops, &c.

An owner in fee demised a farm for seven years, and agreed at the expiration of the term to pay for the tenant's property in and upon the farm at a valuation. He devised the land to trustees for a term of 1000 years upon trust to raise money in aid of his personal estate for payment of debts, funeral and testamentary expenses, and legacies, and subject thereto to the Plaintiff for life, with divers remainders over. On the testator's death the Plaintiff took possession. On the expiration of the term a new tenant could not be found. The Plaintiff paid the outgoing tenant for his property in the farm, and claimed to be repaid the amount out of the testator's estate:—

Held, that the liability to pay the outgoing tenant was a liability attaching to the land, and that the landlord for the time being was the person primarily liable; that the Plaintiff, being in receipt of the rents and profits, was the landlord, and not the trustees of the term, that he therefore was the person primarily liable, and had no claim to be repaid wholly or in part either out of the testator's estate or by the persons entitled in remainder.

THE allegations of the statement of claim were to the following effect:—

In November, 1872, *Courteney Mansel*, owner in fee of the *Ware Farm*, agreed to let it to *A. G. Wood* for seven years from the 29th of September, 1873. A draft lease was prepared, and agreed to in all respects except as to the right of shooting. The draft contained a covenant by *Mansel*, for himself, his heirs, executors, and assigns, that at the expiration or other sooner determination of the term he, his heirs or assigns, would pay or allow to the tenant, his executors, administrators, or assigns, for all the tenant's property in and upon the farm, to be ascertained by a valuation based on the same terms as that according to which *Wood* paid when his tenancy commenced. The terms as to the right of shooting were not agreed to and no lease was ever executed, but the tenant entered into possession and paid the outgoing tenant for the tenant's property in and upon the farm as ascertained by a valuation made according to the custom of

C. A. 1883 MANSEL v. NORTON.

the country. The tenant remained in possession till the 29th of September, 1880, when he gave up possession.

Mansel had died in September, 1875, having made his will by which he devised his real estate to the use of *T. J. Jenkins* and the Defendant for 1000 years upon the trusts therein mentioned, with remainder to the use of the Plaintiff for life without impeachment of waste, with divers remainders over. The trusts of the term were to raise by mortgage the moneys necessary to be raised in aid of the testator's personal estate for the payment of his funeral and testamentary expenses, debts, and legacies, and subject thereto to allow the rents and profits, or so much as should not be wanted for the purposes aforesaid, to be received by the person or persons for the time being entitled to the premises in reversion expectant on the term, and he appointed *Jenkins* and the Defendant executors. *Jenkins* renounced and disclaimed, and the will was proved by the Defendant alone.

On the testator's death the Plaintiff entered into and had ever since continued in possession and receipt of the rents and profits of the testator's real estate. In April, 1880, a new trustee was appointed in the place of *Jenkins*, and on the 6th of August, 1880, the term was assigned to the Defendant and the new trustee. On the 10th of August, 1880, the trustees assigned the term to a mortgagee for £20,000.

On the expiration of the tenant's term in September, 1880, a valuation was made of his property in or upon the *Ware Farm* in accordance with the covenant and the custom of the country, and it was valued at £581. No incoming tenant could be found. *Wood* claimed payment of the amount with interest and costs, amounting in all to £638, from the Plaintiff, and commenced an action to recover it. The Plaintiff paid the sum claimed, it having been previously agreed between him and the Defendant that if the estate of the testator was liable for the payment of it, the Defendant should repay him out of the estate. The Defendant had assets in his hands sufficient for the purpose. The Plaintiff claimed payment of the £638 out of the testator's estate. The Defendant demurred. Vice-Chancellor *Bacon* considered that the case could not be conveniently tried on demurrer, and overruled the demurrer, reserving the benefit of it to the hearing.

The Defendant appealed, and the appeal was heard on the 22nd of January, 1883.

Godefroi, for the Appellant, having stated the case was stopped by the Court.

Marten, Q.C., and *Levett*, for the Plaintiff:—

The liability to the tenant is a personal liability on the part of the testator who created the lease, and ought to be satisfied out of his assets. In *Gorton* v. *Gregory* (1) a devisee was held not liable under a similar covenant. In *Faviell* v. *Gaskoin* (2) executors were held liable.

[*Godefroi*:—In that case the executors were the landlords.]

Bradburn v. *Foley* (3) shews that the lessor is the person liable.

[LINDLEY, L.J.:—That was a case between the landlord and the outgoing tenant, and does not touch the case as between the devisee and the estate of the original landlord.]

The trustees of the term of 1000 years are the real landlords. The case must be treated as if there had been an actual lease, and the lessor is liable under the covenant.

[JESSEL, M.R.:—It is a covenant which runs with the land, and the landlord for the time being is primarily liable. Suppose a landlord covenants to find materials for repairs, could it be contended that his executors are primarily liable under that covenant as between them and the devisee?]

If there was no express covenant, but only an implied one from the custom of the country, the landlord for the time being might be alone liable, but here there is an express covenant.

JESSEL, M.R.:—

I am of opinion that the Plaintiff is the person primarily liable to pay. Difficulties of this kind used seldom to arise. Before the present state of agricultural depression a new tenant could always be found who came in and paid the outgoing tenant, and

(1) 3 B. & S. 90. (2) 7 Ex. 273.
(3) 3 C. P. D. 129.

C. A. 1883 MANSEL v. NORTON. Jessel, M.R.

the landlord was not called upon to pay. The landlord, however, was the person liable to the outgoing tenant, and in the view of the law he paid the outgoing tenant and received the amount back from the incoming tenant. It makes no difference whether the tenancy is from year to year or under a lease. The Plaintiff as tenant for life enters into possession and is the actual landlord, and as such he is primarily liable to the outgoing tenant. The liability attaches to the lessor's interest in the land; it is a liability in respect of the cultivation of the land, and the tenant for life takes the land subject to that liability. It is suggested that the term of years which has been assigned to a mortgagee makes the termors landlords. That is not so. The tenant for life being in receipt of the rents is the actual landlord and the person primarily liable.

The liability of the Plaintiff then is indisputable, and how can he have a remedy over? If he lives long enough he will let the land again and get the outlay from the incoming tenant, and so if he recovered it now from the testator's estate he will be repaid it twice over. In ordinary cases a landlord does not get such an advantage. The new tenant pays the old one, and the landlord gets nothing but the rent. If the tenant for life lives long enough he will get that, if he does not live long enough he will lose by this payment; but that is only the hardship which occurs in every case where a tenant for life who has incurred expense for the benefit of the estate does not live long enough to get the benefit of it. I say this that the Plaintiff may understand not only that he has no claim for this money against the testator's estate, but that he has no claim for any part of it against the remaindermen.

The demurrer must be allowed.

LINDLEY, L.J.:—

I also am of opinion that this claim cannot be maintained. The testator let this farm for a term of years which had not expired at his death. The tenant for life under his will entered into receipt of the rents. This went on for five years, and then the tenant gave up the occupation of the farm and became entitled to be paid at a valuation for his tenant rights. Who is the person to

C. A. 1883 MANSEL v. NORTON.

pay him? The landlord. Who is the landlord? The person from whom he holds and to whom he has paid rent. When the landlord pays is there anybody liable to repay him? I think not. The trusts of the term of 1000 years do not include such a demand as this, and neither under the will nor under any law outside the will do I see that any one is under any liability to repay him.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors: *Nelson, Son, & Hastings*, for both parties.

H. C. J.

C. A. 1883 Jan. 25.

Ex parte HUDSON. *In re* WALTON.

Composition—Registration of Resolutions—Small Amount of Assets—Security—Bona fides—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 295.

Held, that resolutions accepting a composition of 1*s.* in the pound ought to be registered, the debtor having no assets, but the payment of the composition being secured by a third person.

The question in all such cases is whether the creditors, in accepting the composition offered, have acted *bonâ fide*, *i.e.*, in the interest of the creditors, and not merely with a view to benefit the debtor.

There is no hard and fast line as to the amount of composition which may be accepted, except that the sum must not be so small that no reasonable man would accept it; for in such a case the amount would in itself be evidence of want of *bona fides*.

There is no absolute rule that a debtor who has no assets cannot file a liquidation petition.

Ex parte Terrell (1) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 5th of October, 1882, *Edwin Walton*, a coffee-house keeper, filed a liquidation petition. The first meeting of the creditors was held on the 30th of October. By the statement of his affairs then produced by him it appeared that he owed to

(1) 4 Ch. D. 293.

C. A. 1883 *Ex parte* HUDSON. *In re* WALTON.

unsecured creditors the sum of £504 14*s.* 2*d.*, and to secured creditors the sum of £81 0*s.* 3*d.* (there being no surplus from the securities), and that his only asset was a sum of £5 cash in hand. The creditors present at the meeting resolved by the statutory majority to accept a composition of 1*s.* in the pound, payable within seven days from the second meeting confirming the resolutions, and that the security of the guarantee of *W. J. E. Walton* be accepted for the composition, he also being appointed trustee for the purpose of distributing the composition. The resolutions were confirmed at the second meeting on the 20th of November, 1882. The registration of the resolutions was opposed by *H. E. Hudson*, a dissentient creditor, on the ground that, having regard to the amount of the debtor's assets, the proceedings were an abuse of the process of the Court. The Registrar allowed the registration. *Hudson* appealed.

Burleigh Muir, for the Appellant:—

The debtor having practically no assets, the petition is an abuse of the process of the Court, and the resolutions ought not to be registered: *Ex parte Staff* (1); *Ex parte Ball* (2); *Ex parte Aaronson* (3); *Ex parte Williams* (4). In *Ex parte Ball* security was offered for the composition, and yet the Court refused to allow the resolutions to be registered.

[JESSEL, M.R., referred to *Ex parte Terrell* (5), and the observations made on it by *Baggallay*, L.J., in *Ex parte Aaronson* (6).]

Another objection is that the composition is to be paid within seven days after the second meeting. The registration did not take place till after the expiration of those seven days, and till the resolutions were registered they were not binding. The arrangement could not, therefore, be carried out at all.

[*J. Eldon Bankes*, for the debtor:—The composition was tendered to the Appellant within the seven days, but he refused to accept it.

JESSEL, M.R.:—There is nothing in that objection.]

(1) Law Rep. 20 Eq. 775.
(2) 20 Ch. D. 670.
(3) 7 Ch. D. 713.
(4) 18 Ch. D. 495.
(5) 4 Ch. D. 293.
(6) 7 Ch. D. 715.

We believe that the debtor has made away with some of his assets; he has not sufficiently explained what has become of them.

J. Eldon Bankes, for the debtor, was not heard.

JESSEL, M.R.:—

I think that under the circumstances of this case we must treat the arrangement as a *bonâ fide* one, and though 1*s.* in the pound is but a small sum, it is not so small as to be of itself evidence that the resolutions were not passed *bonâ fide*, *i.e.*, passed in the interest of the creditors, and not for the benefit of the debtor. With regard to the authorities, *Ex parte Terrell* (1) is in reality in favour of this view. In that case the debtor filed a liquidation petition, and his statement of affairs shewed that his debts amounted to £11,538, while his assets were only £75, and the creditors resolved to accept a composition of 1*s.* in the pound, to be paid within a month, no security being given for its payment. The Court of Appeal held that the resolution could not have been passed in the interest of the creditors, and that it was not binding on the dissentient minority, and ought not to be registered. Now it is important to see what the three Judges of the Court of Appeal said about it. It is quite plain they all thought that in some cases a composition of 1*s.* in the pound might be sufficient if the arrangement was made *bonâ fide*, and that when the debtor's assets were not sufficient to pay that amount, the arrangement would be valid if security for the payment of the composition was given by a third person. Lord Justice *James* said (2): "The facts of the present case shew that the resolution could not have been passed *bonâ fide*. The debtor had no assets; he merely gives his promise to pay the composition, and nobody else offers to give any security for it." That observation shews that, if any one else had offered to give security, the opinion of the Lord Justice would have been different. He went on, "the creditors merely accept the hope that the son will in the course of a month find the money to pay it. That is not the sort of arrangement which, as it appears to me, was contemplated by the Act as one which

(1) 4 Ch. D. 293. (2) 4 Ch. D. 296.

C. A. 1883 *Ex parte* HUDSON. *In re* WALTON. Jessel, M.R.

could bind the dissentient minority of the creditors." Lord Justice *Baggallay*, after referring to the judgment of Lord Justice *James* in *Ex parte Page* (1), says (2): "It is part of the case set up that there are no assets at all, and that there is no security given for the payment of the composition; consequently, the resolution in substance amounts to nothing more than a release of the debtor from his obligations." There, again, he relies on the fact that no security was given, and his words would have no meaning if the giving of security for the composition was not a material circumstance. In the present case security is offered. Then Lord Justice *Brett*, after observing that the question was whether the resolution was a *bonâ fide* one, adds (3): "The case here is that the debtor had practically no assets; he had no prospect of being able to pay 1*s.* in the pound, and then a resolution is passed that 1*s.* in the pound is to be paid in one month, and no security is to be given for its payment. For whose benefit could such a resolution have been passed? If you assume that he had no prospect of paying the 1*s.*, of what advantage to the creditors could that resolution be? It is plain that it could not be of any advantage to them, and that the only person who could benefit by it was the debtor." There is, therefore, a clear expression of opinion by all the three Judges that a resolution to accept a composition of 1*s.* in the pound would not, *per se*, be held to be evidence of a want of *bona fides*, but that the creditors might accept such a composition as a reasonable dividend if they were acting *bonâ fide*. We know from experience that in many bankruptcies 1*s.* in the pound is a reasonable dividend. Those judgments also go to shew that, if security had been offered for the composition, the registration of the resolutions would have been allowed in that case. And in *Ex parte Aaronson* (4) Lord Justice *Baggallay* expressly states that the resolutions in *Ex parte Terrell* (5) would have been registered, if security for the payment of the composition had been given. It appears to me that the true meaning of the Act is, as it has been stated in all the authorities, that the arrangement must be one which the creditors can, acting *bonâ fide*, accept. If 1*s.* in

(1) 2 Ch. D. 323, 324.
(2) 4 Ch. D. 296.
(3) 4 Ch. D. 298.
(4) 7 Ch. D. 715.
(5) 4 Ch. D. 293.

the pound is more than the debtor's assets will produce, the creditors are *primâ facie* entitled to accept a composition of that amount, if they get security for its payment. This disposes of the supposed rule that a man who has no assets cannot file a liquidation petition at all; if a debtor has no assets, but some third person comes forward and offers to give security for the payment of a composition of 1*s.* in the pound, that is an arrangement which may be properly carried out if it is made *bonâ fide*. The only question then is, whether the creditors in the present case have been acting *bonâ fide*, and I can see nothing in the world to impeach the *bona fides* of the transaction. Though 1*s.* in the pound is not a large sum, I cannot say that in this case it is not a real dividend as distinguished from a sham one, like the 6*d.* in the pound which was offered in *Ex parte Ball* (1). As to the other objection, that the debtor has concealed some of his assets, I do not think he has. I can well understand that he may have suffered losses by depreciation of his stock-in-trade. But if the creditors thought that there were concealed assets, it was their duty to ask the debtor about them at the meetings. The mere fact that a man has not explained every shilling of his losses does not shew that he is acting fraudulently. We know that there are frequently losses in trade by depreciation in the value of goods. There is really no evidence that the debtor has concealed any assets. In my opinion the Registrar's decision was right, and ought to be affirmed.

LINDLEY, L.J.:—

I am of the same opinion. We ought to satisfy ourselves of the real *bona fides* of what is proposed. There is no ground here for thinking that any of the debts said to be due to creditors had been manufactured for the purpose, and to that extent there is *bona fides*. In the next place, the offer of 1*s.* in the pound is *bonâ fide* in this sense, that it is offered by a relative of the debtor who is able to pay it, and it is to be paid net; there is to be no deduction for costs. Though it is a small sum, still it is something. There is a great distinction between liquidation by arrangement and composition. It may well be that in some cases, like *Ex parte*

(1) 20 Ch. D. 670.

C. A. 1883 *Ex parte* HUDSON. *In re* WALTON.

Staff (1), when a debtor has no assets, a liquidation by arrangement may be an abuse of the process of the Court. I am not prepared to say that a composition of 1*s.* in the pound is an abuse of the process of the Court in all cases where the debtor has no assets. Of course an offer of 2*d.* in the pound would be ridiculous. The question is one of *bona fides*, and in my opinion the present is an honest case, and the creditors were entitled to accept the offer.

BOWEN, L.J.:—

I am of the same opinion. The real question is, whether the transaction is *bonâ fide*. There is no hard and fast pecuniary line, except that the sum offered must not be so small that no reasonable man would accept it. The true test is *bona fides*, and I think that under the circumstances of the present case the resolution was passed *bonâ fide*.

Solicitor for Appellant: *Sidney Chapman.*
Solicitors for Debtor: *Hatton & Westcott.*

W. L. C.

C. A. 1882 C. J. B. *Nov.* 6. C. A. 1883 *Feb.* 1.

Ex parte RUSSELL. *In re* ROBINS.

Composition—Registration of Resolutions—Small Amount of Assets—Abuse of Process of Court—Bankruptcy Act, 1869, *s.* 126—*Bankruptcy Rules*, 1870, *r.* 295.

The creditors of a debtor whose debts amounted to £304 18*s.*, and whose assets were only £8 13*s.*, resolved to accept a composition of 3*d.* in the pound, the payment of which was to be secured by one of the creditors. The registration of the resolutions was opposed by a dissentient creditor:—

Held, that, having regard to the small amount of the composition, the resolutions must have been passed solely in the interest of the debtor; that they were an abuse of the process of the Court; and that they ought not to be registered.

Decision of *Bacon*, C.J., reversed.

ELIZABETH ROBINS, a widow seventy years of age, was a lodging-house keeper at *Ilfracombe*. On the 28th of November, 1881, *G. E. Russell*, her landlord, recovered judgment against her

(1) Law Rep. 20 Eq. 775.

C. A. 1883

Ex parte RUSSELL. *In re* ROBINS.

by default in an action in the Queen's Bench Division for £24 17*s.* 6*d.*, the amount of a quarter's rent of the house which she occupied, and costs. She failed to pay the amount, and *Russell* issued a judgment debtor summons against her, which was made returnable on the 10th of March, 1882. On that day she filed a liquidation petition in the *Barnstaple* County Court, and obtained an injunction restraining *Russell* from further proceeding under his judgment. The first meeting of the creditors under the petition was held on the 27th of March. The statement of her affairs then produced by the debtor shewed that her debts amounted to £304 18*s.* and her assets to £8 13*s.* The creditors resolved by the proper statutory majority to accept a composition of 3*d.* in the pound, payable within two months from the date of the second meeting, the due payment of the composition being secured by *M. H. Brown*, who was a creditor for £104 17*s.* 1*d.* The resolutions were duly confirmed at the second meeting. *Russell*, who was a creditor for £67 10*s.* 7*d.*, dissented from the resolutions, and opposed their registration. The Registrar registered them, and *Russell* then applied to the Judge to vacate the registration. The Judge refused the application. *Russell* appealed to the Chief Judge. The appeal was heard on the 6th of November, 1882.

Bigham, for the Appellant:—

The proceedings were a mere abuse of the process of the Court, and having regard to the nature of the claims of the different creditors and the small amount of composition, the resolutions ought not to have been registered: *Ex parte Ball* (1).

Finlay Knight, for the Respondent, was not called upon.

BACON, C.J., said that although it was not competent for a debtor to baffle and disappoint his creditors, there was nothing in the present case to indicate that this was an attempt to whitewash the bankrupt, or that anything had been done collusively or *malâ fide*. All the features which were present in those cases in which resolutions for composition of this kind had been set aside were noticeably wanting in the present case. Upon a

(1) 20 Ch. D. 670.

C. A. 1883 *Ex parte* RUSSELL. *In re* ROBINS. C. J. B.

careful consideration of the facts before him the Registrar of the County Court had confirmed the resolutions, and unless he (the Chief Judge) had before him facts which would compel him to differ from the judgment of the Registrar, he must confirm his decision. It was further to be observed that the resolutions were passed in April, 1882, and after an application by this creditor (the Appellant) to a Court of Common Law. The composition became payable within two months from April. The Appellant had stood by, and the composition was paid to all the creditors except the Appellant, and in his case it was proved to have been tendered and refused; it was not until July that his application to the County Court to have the composition resolutions set aside was made and refused. But his Lordship did not rest his decision upon that, but upon the other ground, viz., of public policy, and being of opinion that the authority of the Court to set aside resolutions which had been duly passed by the creditors ought not to be exercised unless wrong had been done, the appeal must be dismissed with costs.

F. G. A. W.

C. A.

From this decision the dissentient creditor appealed. The appeal was heard on the 1st of February, 1883.

Bigham, for the Appellant:—

The amount of the composition is so absurdly small as to shew that the resolutions must have been passed for the benefit of the debtor. They are an abuse of the process of the Court, and ought not to have been registered.

[He was stopped by the Court.]

Finlay Knight, for the Debtor:—

Two Judges have thought that the resolutions should be registered, and this Court will not interfere. The debtor having no assets, the creditors obtain a benefit by the composition, small as it is, its payment being secured by the guarantee of a third person.

JESSEL, M.R.:—

We cannot allow this sort of thing to be done. I agree that if we were to listen to our feelings of compassion, or benevolence,

or charity with regard to this poor old woman, we should certainly desire to confirm the decision of the Chief Judge. But we must not allow those feelings to override the law, which is, that the resolutions in order that they may bind the minority must be passed *bonâ fide* in the interest of the creditors. The creditors who vote in the majority are no more entitled to be influenced by motives of benevolence or charity than by corrupt motives. They must not pass resolutions in the interest of the debtor. That is not within the intention of the Act. It is clear that in the present case the object was, not to give the creditors anything substantial, but to release the debtor. On this ground we must allow the appeal, though I am sorry for it.

LINDLEY, L.J.:—

I am of the same opinion. A majority who are actuated by feelings of compassion for the debtor cannot bind the minority. The resolutions must be passed in the interest of the creditors.

BOWEN, L.J.:—

I am of the same opinion. The Court of Bankruptcy is not like a charitable institution for the deaf and dumb; the object of its process is the benefit of creditors.

Solicitors for Appellant: *Church, Rendell, & Trehane*, agents for *H. K. Thorne, Barnstaple.*

Solicitors for Debtor: *Kennedy, Hughes, & Kennedy*, agents for *W. P. Bencraft, Barnstaple.*

W. L. C.

C. A.
1883
Feb. 1.

Ex parte NICHOLS. *In re* JONES.

Equitable Assignment of future Receipts of Business—Bankruptcy of Assignor—Relation back of Trustee's Title—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 11.

An assignment by a trader of the future receipts of his business, even if made for value, is, as regards receipts accruing after the commencement of his subsequent bankruptcy, inoperative as against the title of the trustee in the bankruptcy.

Brice v. *Bannister* (1) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

William Henry Jones and *Benjamin Barber* carried on business together in partnership, and were lessees of the *Alexandra Palace*. They entered into a verbal contract with the *Great Northern Railway Company* whereby it was agreed that the company should take (in addition to the railway fares of passengers over their lines to the palace) the admission fees of such passengers, and should pay to *Jones & Barber* a certain proportion of the gross sums so received for railway fares and admission, rendering an account monthly. On the 21st of March, 1882, *Jones & Barber*, by way of security to Messrs. *Younger & Co.* for advances made by them, executed a deed whereby they assigned to *Younger & Co.* "All and every the sums and sum of money now due and owing, and hereafter to become due and owing, from the *Great Northern Railway Company* to *Jones & Barber*," on trust, after paying expenses, to apply the moneys so received in payment of the debt due by *Jones & Barber* to *Younger & Co.*, and to pay the surplus, if any, to *Jones & Barber*. Notice of this assignment was given by *Younger & Co.* to the railway company on the 22nd of March. On the 10th of August, 1882, *Jones & Barber* filed a liquidation petition, and on the 11th of August *C. L. Nichols* was appointed receiver of their property and manager of their business, and he on the 12th of August gave notice to the railway company of his appointment, and requested them to remit to him "*Jones &*

(1) 3 Q. B. D. 569.

Barber's share of the railway fares to the *Alexandra Palace*" from the 10th of August. The first meeting of the creditors under the petition was held on the 8th of September, when a liquidation by arrangement was resolved upon, and *Nichols* was appointed trustee. He carried on the business of the *Alexandra Palace* from the date of his appointment as receiver and manager up to the 31st of August, 1882, on which day it was closed, and during that period he continued to admit visitors to the *Palace* on the footing of the arrangement between *Jones & Barber* and the railway company. After his appointment the proportion of the sums received by the company from passengers to the *Palace*, which, under the arrangement between the company and *Jones & Barber*, was payable to the latter up to the date of the filing of the petition, was, with the consent of the trustee, paid to *Younger & Co.* The sums which under the arrangement with the company became due by them to *Jones & Barber* from the 10th of August up to the closing of the *Palace* amounted to £587 3*s.* 8*d.* This sum was claimed by *Younger & Co.*, to whom a large debt still remained due by *Jones & Barber*, and also by the trustee, on the ground that his title related back to the filing of the liquidation petition. The Registrar held that *Younger & Co.* were entitled to the £587 3*s.* 8*d.* The trustee appealed.

Cooper Willis, Q.C., and *J. C. Earle*, for the Appellant:—

The benefit of the contract between the debtors and the railway company vested in the trustee on his appointment as from the date of the filing of the petition, and by virtue of that relation back the title of the mortgagees is overridden as to the moneys which became due from the railway company under the arrangement since the filing of the petition: *Collyer* v. *Isaacs* (1).

[JESSEL, M.R. How can a trader mortgage as against the trustee in his bankruptcy the profits of his business arising after his bankruptcy? It is a mere accident that the business was carried on in this case after the filing of the petition. It ought to have been stopped.]

The assignment is of moneys owing from the railway company

(1) 19 Ch. D. 342.

C. A. 1883 *Ex parte* NICHOLS. *In re* JONES.

to the debtors. The moneys now in question are owing from the company to the trustee: *Bankruptcy Act*, 1869, sects. 4, 11, 15, 17.

[They were stopped by the Court.]

Winslow, Q.C., and *B. Houghton*, for the mortgagees:—

A debt to become due hereafter can be validly assigned for value.

[JESSEL, M.R.:—If the bankruptcy of the assignor intervenes the debt is never due and owing to him. It was due to him until by the relation back of the trustee's title it was destroyed *ab initio* as a debt due to the bankrupt.]

The moneys in question became due under a contract entered into before the filing of the petition. In *Brice* v. *Bannister* (1) a shipbuilder was to be paid the price of a ship in instalments, and he by an instrument in writing directed the defendant, the purchaser of the ship, to pay £100 to the plaintiff (to whom he was indebted) out of moneys due or to become due from the defendant to the shipbuilder, and notice in writing was given to the defendant. The defendant however, notwithstanding the notice, paid the balance of the price of the ship, amounting to more than £100, to the shipbuilder, and it was held that the plaintiff could recover the £100 from the defendant.

[JESSEL, M.R.:—I think that case was rightly decided, and, if there had been no bankruptcy, it would be an authority for saying that you have a good equitable charge. But it is not good as against the trustee in the bankruptcy.]

The assignment by operation of law to a trustee in bankruptcy does not stand so high as an assignment for value to a purchaser. The contract between the debtors and the railway company could not be terminated till the appointment of the trustee. It was in the option of the trustee to accept the contract or to disclaim it, but, if he takes it, he must take it subject to all the equities which affect it. The receiver chose to treat it as a subsisting and valuable contract, and gave notice to the railway company that

(1) 3 Q. B. D. 569.

he wished it to continue. The Registrar's view was that the assignment to us was, not of profits, but of gross receipts of the business, and that the trustee must take the receipts subject to the outgoings.

JESSEL, M.R.:—

This is a total misapprehension of the nature of the bankruptcy law. Let us consider what the contract with the railway company was. The debtors carried on the business of the *Alexandra Palace*, and they made an arrangement with the railway company to this effect, that the fees paid by the public for conveyance to the *Palace* and admission into it should be received in one gross sum by the railway company, and that this sum should be divided in certain specified proportions between the debtors and the company. For this lump sum the railway company were to convey the public to the *Palace*, and the debtors were to admit them into it. What is the meaning of this contract? It makes the railway company the agents of the debtors to receive their share of the gross charge. Strictly speaking, there ought to have been two charges, one for the conveyance, and the other for the admission; but this arrangement was made for the convenience of the public, and probably also for the convenience of the debtors. Of course the railway company became debtors to *Jones & Barber* for their share of the gross sums which they received from the public under the arrangement. The arrangement was nothing more than an agreement for the division of the gross sum paid by the public for conveyance to the *Palace* and admission into it. There is simply a receipt by the railway company of the charge paid by the public for admission into the *Palace*, and it makes no difference that they received it under an express contract instead of an implied contract. It only became a debt due to *Jones & Barber* from the company after they had received it. It is really the same thing as if the money had been paid by the public at the doors of the *Palace*. It represents gross earnings of the persons who are carrying on the trade. When a man becomes a bankrupt the bankruptcy relates back to the act of bankruptcy on which it is founded, and the receipts from his business after the date of

C. A. 1883 *Ex parte* NICHOLS. *In re* JONES. Jessel, M.R.

the act of bankruptcy, though they are in the hands of an agent who has received them, pass to the trustee in the bankruptcy. The income derived from the business after the act of bankruptcy passes to the trustee. The business of the *Palace* being carried on, these sums are payments made by the customers to the man who was carrying it on. They stand in the same position as payments made by the public for admission to a theatre, or payments made by the customers of a man who keeps a cheesemonger's shop. That being so, it is clear that the title of the trustee relates back to the act of bankruptcy, *i.e.*, to the filing of the petition. But it is said that the payments were received by the railway company under a contract which the trustee affirms. That is a fallacy. The trustee would have had a right to the debtors' share of the gross sums received by the company, even if he had annulled the contract. His affirmance of the contract was only an assent to the division of the gross sums in the proportion there laid down; he did not adopt the contract in any other sense. That being so, his title is quite unaffected by any assent to the contract. Then it is said that the Respondents are claiming under a mortgage or assignment made to them by the bankrupts before the bankruptcy. The answer to that is, that by no assignment or charge can a bankrupt give a good title as against his trustee to profits of his business accruing after the commencement of the bankruptcy. The bankrupt cannot as against the trustee assign these profits; they are not his property. It was an accident in the present case that the business was carried on at all after the filing of the petition, but, being so carried on, it was carried on *ex relatione* by the trustee for the benefit of the bankrupts' estate. The case bears no analogy to cases in which the property of a bankrupt has been validly charged by him before his bankruptcy. This sum of money was not the property of the bankrupts, and they could not validly assign it as against the trustee.

LINDLEY, L.J.:—

I am of the same opinion. The argument has been founded upon some little confusion between an equitable assignment of after-acquired chattels, such as was held valid in *Holroyd* v.

Marshall (1), and an assignment like that now in question. I do not think anything turns upon the exact language of the assignment. It is in terms an assignment to *Younger & Co.* of moneys due and to become due from the railway company to *Jones & Barber;* I think it would be in substance the same thing if it had been an assignment of moneys due and to become due from the railway company under the prior arrangement. It is an agreement to assign to *Younger & Co.*, not property of *Jones & Barber*, but money which would become due to them under the arrangement between them and the railway company. Is that an equitable assignment which can prevail against the title of the trustee in the bankruptcy? It is a mere agreement, for the breach of which no doubt an action would lie, but which cannot prevail against the title of the trustee so far as regards payments received by the railway company under it after his title accrued. Those payments became due to the trustee. The decision in *Brice* v. *Bannister* (2) was founded on the principle that the right of an equitable assignee of a debt cannot be defeated by a voluntary payment by the debtor to the assignor.

BOWEN, L.J.:—

I am of the same opinion. These payments *in futuro* were not property of the bankrupts which they could assign as against the title of the trustee in their bankruptcy.

Winslow asked for leave to appeal to the House of Lords.

THE COURT refused the application.

Solicitor for Trustee: *W. Sturt.*
Solicitor for Mortgagees: *C. Sawbridge.*

(1) 10 H. L. C. 191 (2) 3 Q. B. D. 569.

W. L. C.

C. A.
1882
C. J. B.
Dec. 18.
C. A.
1883
Feb. 1.

Ex parte WILKINSON. *In re* BERRY.

Act of Bankruptcy—Fraudulent Conveyance—Assignment of whole of Property to secure existing Debt—Agreement by Assignee to make Further Advance—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2.

In order that a deed, assigning the whole of a debtor's property as security for an existing debt, may not be fraudulent and an act of bankruptcy within sub-sect. 2 of sect. 6 of the *Bankruptcy Act*, 1869, on the ground that the assignee agreed to make further advances to the assignor, it is not necessary that the agreement should be technically binding at law or in equity; a *bonâ fide* promise is sufficient.

The question in all such cases is whether the arrangement was made *bonâ fide* with the view of enabling the debtor to continue his business, or whether it was a mere scheme to obtain payment of the existing debt.

Ex parte Dann (1) commented on.

JOSEPH BERRY was a cotton spinner, carrying on his business at *Bent Grange Mill*, in *Oldham*, and at *Busk Mill*, in *Chadderton*. He had been supplied with cotton by *Seville & Co.*, who were cotton brokers at *Liverpool*. In June, 1882, he owed them £885 for cotton which they had previously supplied to him, and he desired to obtain further supplies from them for the purposes of his business. They declined to furnish him with any more cotton unless he would give them security for the existing debt, and for the price of the cotton which they should further supply him up to a certain amount, and he agreed to give them a bill of sale of his machinery, and plant and stock-in-trade in the *Bent Grange Mill*. Accordingly, on the 7th of June, 1882, a deed was executed which contained the following recital: "Whereas the said *Joseph Berry* is already indebted to the said *Seville & Co.* in the sum of £885 for cotton heretofore supplied by them to him in his business of a cotton spinner at the said mill, and has applied to them to supply him with further cotton from time to time for the purpose of the said business, which they have agreed to do upon the condition that the amount of his indebtedness to them from time to time shall not exceed £1250 on balance of

(1) 17 Ch. D. 26.

account, and shall be secured to them by a bill of sale of the trade machinery, and personal chattels belonging to him and used by him in the said mill, and described in the schedule hereto." And by the deed *Berry*, in pursuance of the agreement and in consideration of the premises, assigned to *Seville & Co.* all and singular the engines, trade machinery, plant, stock, utensils, articles, personal chattels and things belonging to him, and used by him in the mill, and particularly described in the schedule thereto, by way of mortgage to secure the payment of the £885 and further advances, not exceeding in the whole £1250. There was evidence that the sum first inserted in the bill of sale was £1000, but the debtor refused to sign for this amount and wished £1500 to be inserted. To this the lenders refused to consent, declining to go beyond £1250, for which amount it was ultimately settled. The deed contained no express covenant binding *Seville & Co.* to furnish further supplies of cotton to *Berry*, nor was there any written agreement to that effect, nor was the deed executed by *Seville & Co.* It was however stamped so as to cover an advance of £1250, and it was registered under the *Bills of Sale Act.* After the execution of the deed *Seville & Co.* made further supplies of cotton to *Berry* to nearly the specified amount.

On the 4th of August, 1882, *Berry* filed a liquidation petition in the *Oldham* County Court. The balance due from him to *Seville & Co.* at the time was £1186 8*s.* 2*d.*

The trustee in the liquidation applied to the County Court for a declaration that the bill of sale was fraudulent and void as against him, and an act of bankruptcy, as being an assignment of substantially the whole of the debtor's property to secure an existing debt, without a sufficient present advance, and the Judge made a declaration accordingly. *Seville & Co.* appealed.

The appeal was heard on the 18th of December, 1882.

Winslow, Q.C., and *French*, for the Appellants :—

There was a *bonâ fide* present advance by the Appellants of a substantial sum to the debtor to enable him to carry on his business, and therefore the bill of sale which was given as a security for the advance was not fraudulent as against the trustee,

C. A. 1883

Ex parte WILKINSON. *In re* BERRY.

nor an act of bankruptcy: *Ex parte Threlfall* (1); *Ex parte Winder* (2); *Ex parte King* (3). Beyond the property comprised in the bill of sale there was a substantial surplus, which has been received by the trustee.

Horton Smith, Q.C., and *S. Taylor*, for the trustee:—

The bill of sale was fraudulent and void and an act of bankruptcy, inasmuch as for the purpose of securing an antecedent debt it placed the bulk of the grantor's property out of the reach of his creditors: *Smith* v. *Cannan* (4); *Ex parte Hawker* (5); *Ex parte Foxley* (6). And when, as in this case, the bill of sale comprises substantially the whole of the grantor's property, and though given as a security for an existing debt and further advances, there is nothing giving the grantor the right to call for subsequent advances, and the grantee does not bind himself to make any, it is void as an act of bankruptcy: *Ex parte Dann* (7); in which case, notwithstanding the fact that further advances were actually made after the date of the bill, the absence of any binding agreement by the grantee to make subsequent advances was held to invalidate the bill of sale.

BACON, C.J. (after observing that the simple question before him was whether the execution of the bill of sale was an act of bankruptcy, and therefore fraudulent or void against the creditors, and stating the facts of the case, said):—

In my opinion there is a substantial exception from the whole of the bankrupt's property, and that is for the purpose of securing the very means of carrying on his business. Nobody has assigned and nobody can conceive any motive that the Appellants could have had in furnishing him with cotton, except for the purpose of carrying on his business. By repeated decisions it has been held that, although an assignment of all a debtor's property for securing a past debt is an act of bankruptcy, it is exempted from that consequence when there is a present substantial advance, or when

(1) 46 L. J. (Bkcy.) 8.
(2) 1 Ch. D. 290.
(3) 2 Ch. D. 256.
(4) 2 El. & Bl. 35.
(5) Law Rep. 7 Ch. 214.
(6) Ibid. 3 Ch. 515.
(7) 17 Ch. D. 26.

there is such an engagement entered into as may enable the bankrupt to carry on his business. Here the engagement is plain—plainly performed and perfected by the Appellants, who did furnish him with goods to a very considerable amount after the execution of the bill of sale. The case, in my opinion, is unarguable. None of the authorities which have been referred to have any application. *Ex parte Dann* (1) certainly has not the slightest application, for there there was a plain distinct act of bankruptcy *per se*, and the fact that the landlord had lent the bankrupt some money to pay his labourers was not held to be an assisting him in carrying on his business so as to save that which was a notorious act of bankruptcy—notorious to the grantee of the bill of sale as well as other persons—from the consequences of that fraudulent transfer of his goods. The learned Judge here says he came to the conclusion, putting the figures together, that this was an assignment of all the bankrupt's available property. Then it is said that there had been transactions between this bankrupt and his yarn merchants. The nature of them does not appear. They were open accounts. I do not know how the fact may be, but it is improbable that the yarn merchants owed the bankrupt any money. What the nature of these transactions was I do not know. Whether they were to be taken into consideration as a part of his property or not I am not furnished with the means of knowing. The bankrupt's books which, although not forthcoming as to this mill, are said to exist as to the other, are not looked into. The trustee, upon whom the *onus* is of shewing that this was an act of bankruptcy, had the means of laying before the Court, if he thought right, all requisite information respecting the transactions of the other mill, but, as the matter stands, the case presents itself to me like many other cases before this Court where a trader wanting to carry on business applies to the merchants, who supply him with goods to carry on his business, and makes a present assignment of his property, either with an engagement—or without an engagement on a clear understanding—that he is to have a further advance, and a further advance is made. It is impossible that this Court or any jury or any person can infer from such a transaction as is here proved to have taken

(1) 17 Ch. D. 26.

C. A. 1883 *Ex parte* WILKINSON, *In re* BERRY.

place between the parties that the intention of either creditor or debtor was that the general creditors of the bankrupt should be prejudiced by the transaction which then took place.

In my opinion this is a perfectly good bill of sale, and the right of the Appellants is one which cannot be gainsaid, and, as I form a clear opinion upon it, I so express it.

F. G. A. W.

From this decision the trustee appealed.

The appeal was heard on the 1st of February, 1883.

Horton Smith, Q.C., and *S. Taylor*, for the Appellant:—

In order to support an assignment of the whole of a debtor's property as security for an existing debt and further advances, it is necessary that there should be an agreement legally binding the assignee to make the further advances; a mere promise or understanding is not sufficient even if the advances are in fact afterwards made: *Ex parte Dann* (1).

[JESSEL, M.R.:—It is plain from the report of that case that there was no agreement at all there, binding or not binding. It is not a decision that there must be a binding agreement; there are only some expressions used by Lord Justice *Cotton* which might be so construed. But the other Judges did not put their judgments on that ground. The principle is laid down in Mr. *Robson's* Bankruptcy Law (2) thus: "In cases of the sort under consideration, the debtor, if a trader, gains nothing by the transaction to assist in carrying on his business; and, whether a trader or not, he places himself and the whole of his estate at the mercy of a particular creditor, whilst his other creditors are obstructed in their legal remedies." An arrangement the performance of which could not be specifically enforced in equity might be a very valuable commercial agreement to assist the debtor in carrying on his business. The question is whether it was entered into *bonâ fide* for some other object than to give the creditor security for his existing debt, and with a view to the continuing of the debtor's business.]

(1) 17 Ch. D. 26. (2) 4th Ed. p. 133.

In *Ex parte Dann* (1), Lord Justice *Lush*, in effect, concurs with the view of Lord Justice *Cotton*.

There is no sufficient ground for setting aside the conclusion of the County Court Judge on the evidence. He saw and heard the witnesses.

[JESSEL, M.R.:—If in the Court below the whole case turned on the demeanour of the witnesses, as a general rule we should not interfere.

BOWEN, L.J.:—I am not sure that the County Court Judge was applying the true test; he seems to have thought that the fact that there was no agreement binding the creditor to make further advances was an overwhelming circumstance.]

[Reference was also made to *Ex parte King* (2); *Ex parte Ellis* (3); *Ex parte Greener* (4); *Ex parte Foxley* (5).]

Winslow, Q.C., and *Bigham*, for *Seville & Co.*:—

No doubt the Court must look at all the facts in order to see whether the object was only to secure payment of the existing debt, or to enable the debtor to continue his business, and it should be remembered that, if the deed should be held to be an act of bankruptcy, the creditor would lose not only his existing debt but also his further advances: *Ex parte Fisher* (6); *Ex parte King*; *Ex parte Winder* (7).

JESSEL, M.R.:—

I am satisfied that the debtor did by this deed assign the bulk of his property. He did it no doubt under great pressure; he could not go on without further supplies of cotton. The mortgagees were the persons to supply the cotton if any one did, and they agreed to continue the supply up to a total amount of £1250, including the debt then owing to them; which appears by the recital in the deed to have amounted to nearly £900. There was, therefore, to be an advance to the extent of £350 over and above

(1) 17 Ch. D. 26.
(2) 2 Ch. D. 256.
(3) Ibid. 797.
(4) 46 L. J. (Bkcy.) 76.
(5) Law Rep. 3 Ch. 515.
(6) Ibid. 7 Ch. 636.
(7) 1 Ch. D. 290.

C. A. 1883 *Ex parte* WILKINSON. *In re* BERRY. Jessel, M.R.

the amount which was then owing. The deed recites an agreement to that effect on the part of the mortgagees, on condition that security should be given to them for the amount then owing and also for any further advance up to the total amount of £1250. If there was really a *bonâ fide* agreement on the part of the mortgagees to give the further supply of cotton with the view of enabling the debtor to carry on his business, it appears to me that the transaction would not be an act of bankruptcy, even assuming that the deed included the whole of the debtor's assets. Was this then such a *bonâ fide* agreement, or was it a mere pretence to secure payment of the existing debt? I should like to be able to say that the evidence was more satisfactory than it is. But there are two answers to be made. In the first place, this is an appeal from the decision of the Chief Judge, and he has come to the conclusion, on the evidence, that the transaction was a *bonâ fide* one, and before we can reverse his decision we must be satisfied that he was wrong. In the second place, the obligation was on the trustee to shew that the transaction was not a *bonâ fide* one, and we must be satisfied that he has discharged his obligation. In both these points of view I think the evidence is deficient.

I by no means adopt the view that the contract by the mortgagee to make further advances must be a binding contract in this sense, that the specific performance of it could be enforced in equity or damages for the breach of it recovered at law. The meaning of the law on this subject is that the validity of the deed depends upon the question whether it was a fraudulent deed, that is, executed in order to defeat or delay creditors. Every one who is engaged in or acquainted with business matters, knows that business men are in the habit of acting on what I may call "honour contracts," contracts which are not binding in law, contracts of a vague and indefinite character, the specific performance of which could not be enforced in equity, nor could damages for the breach of them be recovered at law. But business men act upon such contracts every day. If a debtor says to his creditor, Will you continue supplying me with goods on credit, and the creditor says, I will, if you give me such a security, and no definite time is fixed during which the supply is to last (the creditor may even say, I will go on supplying you as long as you are

doing well in your business), the debtor may be able to rely on the character of the creditor and may be content with his mere promise. And it appears to me that, if it is a *bonâ fide* promise, made not for the mere purpose of securing the existing debt, but to enable the debtor to carry on his business as before, if it is a *bonâ fide* arrangement on both sides, the mere fact that there is not a technically binding contract to make further advances is not sufficient to lay the arrangement open to the objection that it was made to defeat or delay creditors, and therefore fraudulent and void as an act of bankruptcy. In the present case, indeed, I think that the contract was much more definite than that. I can see nothing on the face of it to lead to the conclusion that it was a fiction. One of the parties has sworn that it was not, and he was not cross-examined. The debtor says that he was in such a state of embarrassment that he could not go on. He did not, however, communicate to the creditors in what a melancholy state his affairs were, and it does not appear that they knew it. After the arrangement in question was made they actually supplied him with goods to very nearly the amount mentioned in the deed. That is evidence of their *bona fides*, evidence that they always intended to supply the goods. Looking at the arrangement as a whole, and that is the proper way to look at it, I think the evidence falls short of shewing that it was a mere scheme to obtain payment of the pre-existing debt.

On the whole, though it is a case of some suspicion, I do not, as a Judge of Appeal, feel that I am in a position to differ from the conclusion of the Chief Judge. The appeal must be dismissed.

LINDLEY, L.J.:—

The question is whether the security which was given to the Respondents amounted to an act of bankruptcy within sub-sect. 2 of sect. 6 of the *Bankruptcy Act*, 1869. Let us see what sort of conveyances or dispositions are fraudulent within that sub-section. It would, I think, be dangerous to lose sight of the statutory enactment in considering the tests of its application. The first thing which suggests itself as coming within the words is a fraudulent preference, and I think the County Court Judge regarded the transaction rather as a fraudulent preference. I do

C. A. 1883

Ex parte WILKINSON. *In re* BERRY.

Lindley, L.J.

not, however, think that the evidence supports that view; nor has the appeal been argued on that footing. It is suggested that the deed is an act of bankruptcy, because it is an assignment of the whole of the debtor's property in consideration of an existing debt. No doubt that is one of the tests for determining whether a deed is fraudulent; but in applying that test we must not lose sight of the words of the statutory enactment, and we must have regard to the deed itself and to all the circumstances of the case. The deed contains a recital that the mortgagees had agreed to supply the debtor with cotton up to a certain amount. They did not execute the deed, but still the recital is evidence of an agreement on their part to supply him with that which he needed in order to carry on his business, and they did in fact supply him with it. It appears to me that the case is one of some difficulty and suspicion; but, having listened to the argument, I am of opinion that, the burden of proof being on the trustee, the materials are insufficient for upsetting the deed. It is too doubtful a case to justify us in coming to the conclusion that the transaction was fraudulent.

BOWEN, L.J.:—

I am of the same opinion. I agree in what has been said as to the facts, as well as in the view of the law which has been expressed by the Master of the Rolls.

Appeal dismissed with costs.

Solicitors for trustee: *Hamlin & Grammer*, agents for *Joseph Whitaker, Oldham.*

Solicitors for mortgagees: *W. W. Wynne & Son*, agents for *Simpson & North, Liverpool.*

W. L. C.

Ex parte FOSTER. *In re* FOSTER.

C. A.
1883
C. J. B.
Jan. 15.
C. A.
Feb. 8.

Debtor's Summons—Dismissal—Legal or equitable Defence to Action—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 7—*Inchoate Agreement between Debtor and Creditors.*

In order to justify the issuing of a debtor's summons under sect. 7 of the *Bankruptcy Act*, 1869, the alleged debt must be an exigible debt; if the debtor would have any defence, legal or equitable, to an action for the debt the summons ought to be dismissed.

Two partners in trade whose affairs were embarrassed, without filing a liquidation petition, summoned a meeting of their creditors. Nineteen out of twenty-seven creditors attended the meeting, their debts amounting to £2400 out of a total of £2628, and a resolution was passed that a deed of assignment of the debtors' estate and effects should be made to three persons named, as trustees for the benefit of the creditors, with power for them to carry on the business for such time as they should think fit, and to sell the concern as a going concern, or otherwise. One of the debtors was to have his discharge on payment of £200, or otherwise as the creditors might direct. The resolution was signed by the chairman of the meeting, but by no one else. The day after the meeting the debtors gave up possession of their assets to the persons named in the resolution as trustees, and those persons carried on the business for a few weeks, and proceeded to collect the book debts. A draft deed of assignment was prepared in accordance with the resolution, but it was never executed, the other creditors not having assented to the arrangement embodied in the resolution:—

Held, that, inasmuch as all the creditors did not come in and assent to the arrangement, there was no binding agreement between the debtors and their creditors, and that, consequently, a creditor who was present at the meeting, even if he had assented to the resolution, which appeared to be doubtful, was entitled to issue a debtor's summons for his debt.

AMBROSE FOSTER and *J. T. Wright* carried on the business of india rubber manufacturers in partnership at *Manchester*, under the firm of *Foster & Wright*. In October, 1882, they, being in difficulties, summoned a private meeting of their creditors. The meeting was held on the 16th of October. There were altogether twenty-seven creditors, and their debts amounted in the whole to £2628 8*s.* 6*d.* Nineteen of the creditors attended the meeting, their debts together amounting to about £2400. The largest creditors were a firm of *Heilbut, Symons, & Co.*, whose debt amounted to £777 8*s.* 9*d.* *Samuel Heilbut*, a member of this firm, attended the meeting. The debtors produced a statement of

C. A. 1883

Ex parte FOSTER. *In re* FOSTER.

their affairs which had been prepared by an accountant. After considerable discussion the following resolution was put to the meeting and was carried: "That a deed of assignment of the debtors' estate and effects be made to Mr. *David Lang*, Mr. *Sinclair*, and Mr. *Lawley*, as trustees for the benefit of the creditors, with power for them to carry on the business for such time as they think fit, and to sell the concern as a going concern, or otherwise. Two of the trustees to form a quorum. Mr. *Wright* to have his discharge on payment of £200, or otherwise as the creditors may direct. The deed of assignment to be prepared by Messrs. *W. L. Welsh & Son*. Costs to be paid out of the estate." This resolution was signed by *Lang*, who acted as chairman of the meeting. It was disputed whether the resolution was carried unanimously or not, and there was a conflict of evidence as to whether *Heilbut* assented to it or not, but for the purpose of deciding the question before them the Court of Appeal assumed that he did assent. Part of the debtors' property consisted of a leasehold factory in which they carried on their business. The day after the meeting the debtors gave up possession of their stock-in-trade, and all their joint assets to the three persons who were named in the resolution as trustees, and those persons carried on the business for a few weeks, and proceeded to collect the book-debts. A draft of a deed of assignment was prepared by Messrs. *Welsh & Son*, but the deed was never executed. The night after the meeting of the creditors the debtors' works were forcibly broken into and their books were abstracted. It was not ascertained by whom this was done, but the books were afterwards recovered.

On the 27th of October, *Heilbut & Co.* issued a debtor's summons out of the *Manchester County Court* against the debtors for a sum of £189 5*s.* 10*d.*, the amount of a dishonoured acceptance of the debtors, which formed part of the debt of £777 8*s.* 9*d.* The debtors applied to the County Court to dismiss the summons, on the ground that they were not indebted to *Heilbut & Co.* in the amount claimed. The Registrar dismissed the summons, on the ground that it was proved that *Heilbut* assented to the resolution, and that he was estopped from issuing a debtor's summons, because to do so would be inconsistent with his agreement.

Heilbut & Co. appealed to the Chief Judge.

The appeal was heard on the 15th of January, 1883.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the Appellants: —

The question is whether the proceedings at the meeting of the 16th of October amounted to an accord and satisfaction of the Appellants' debt. The resolution passed at that meeting was not signed by any one; the debtor *Wright* was to have his discharge on payment of £200, but there was no time specified for the payment, and no undertaking on *Wright's* part to make the payment; and the deed of assignment was never executed. The Appellant *Heilbut* says he treated the resolution as an inchoate proposition, not to be binding until a proper deed was executed and that he neither assented to nor dissented from the resolution, in fact, he tacitly assented to it.

Where an application is made to dismiss a debtor's summons, under sect. 7, the only points open for discussion, are—debt or no debt—and, if a debt, then whether such debt is of sufficient amount. No other ground of argument is admissible: *Ex parte Ellis* (1). Even supposing this resolution gave us security, that does not affect our right: *Ex parte Mauritz* (2).

Winslow, Q.C., and *S. Taylor*, for the debtors:—

The effect of the resolution was a cession of all the debtors' property. Not only was it so in terms but also in effect, for the trustees were either to carry on the business or to sell it as a going concern, as they might think best; and to this all the creditors present, including *Heilbut*, assented. That amounts to an accord and satisfaction; but, whether or not, the real question is, can a creditor sue, after assenting to such a resolution as this? The answer is he cannot: *Good* v. *Cheesman* (3). How can the Appellants, having assented to a proposal by the Respondents to strip themselves of all their property, turn round and call upon them to pay, secure, or compound the debt, under penalty of bankruptcy? *Tatlock* v. *Smith* (4). Again, there having been here a *cessio bonorum*, the Court will not permit the Appellants

(1) Law Rep. 6 Ch. 602.
(2) Ibid. 5 Ch. 779.
(3) 2 B. & Ad. 328.
(4) 6 Bing. 339.

C. A. 1883 *Ex parte* FOSTER. *In re* FOSTER.

to gain an advantage over the other creditors: *Wood* v. *Roberts* (1). Such an agreement as this has a very different effect from giving the Appellants security; it operates as a complete discharge: *Whitmore* v. *Turquand* (2). Similar decisions were arrived at under the *Bankruptcy Act* of 1861, which enabled a man under certain conditions to make a cession for the benefit of creditors by a deed in a form given in a schedule to the Act, and which form did not contain in terms a release of the debtor. The resolution was a mutual agreement between the creditors, of which the taking out of this summons is a breach.

Ex parte Ellis (3) really does not apply, because what we are now discussing is whether the debt has not been satisfied, that is, whether or not the creditor is entitled to sue.

The Appellants, having assented to the resolution, are, in law, estopped from taking further proceedings.

As a matter of fact an offer was made by the Respondents, though not embodied in the resolution, to hand over any surplus of their separate estates.

BACON, C.J.:—

The right of the Appellants under the statute is plain. That they are creditors is not disputed. That they have served the debtors is clear. But then the debtors avail themselves of a statutory provision for the purpose of satisfying the Court that the summons ought to be dismissed; and that is really the only question before me.

Something has been said about the extent to which Mr. *Heilbut* is bound by his assent, which is not disputed. Mr. *Willis* says, "At least he gave a tacit assent." A tacit assent is as good as any other assent for the purpose of the proceedings which took place upon it, namely, actual cession by the debtors of their property—possession taken by the trustees—and a deed of assignment prepared though not executed—the debtors being willing and ready to execute the deed when settled. With all that, however, I have nothing to do. The statute prescribes the only grounds on which an application to dismiss a summons shall be

(1) 2 Stark. 417. (2) 3 D. F. & J. 107.
(3) Law Rep. 6 Ch. 602.

heard. The words (sect. 7) are, "Any debtor served with a debtor's summons may apply to the Court . . . to dismiss such summons on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted to such amount as will justify such creditor in presenting a bankruptcy petition against him." Those words limit and prescribe the authority which the Court has in dealing with a debtor summons.

In *Ex parte Ellis* (1) a creditor who had got a judgment against a debtor for some unpaid costs of an amount sufficient to sustain proceedings in bankruptcy, took out a debtor summons. The debtor applied to have the summons discharged, because he said the creditor was taking an unfair advantage of him. The creditor knew that the debtor was suing him in an action of ejectment, in which it was quite possible the debtor might recover a larger sum in damages than the amount of the alleged debt, and the debtor said he believed the summons was taken out to embarrass his proceedings in the action. Upon these representations the Registrar was induced to believe that he had jurisdiction to enter into equitable or legal considerations, and that he was justified in dismissing the summons; and whether he had such jurisdiction or not was the point there decided. I cannot now dispute or go against the decision pronounced in *Ex parte Ellis*. [His Lordship read the judgment in *Ex parte Ellis*, observing that neither in that case nor in the present was there any application to suspend proceedings, and continued:—] Can anything be more distinct than that decision? If there were any doubt on the words of the Act of Parliament, as I think there is not, the doubt would be removed entirely by the clear decision in that case. I do not wonder that the Court, in this instance, having heard the facts, which were not disputed, was strongly adverse to the consequences of what had taken place. When the application in this case was made to the Court, it was open to the Court under its general jurisdiction to enter upon the consideration of the circumstances which have been stated to-day, and to have come to the conclusion that it would be unjust to permit proceedings in bankruptcy to go on at all at the instance of a man who, as I have said, admits that on

(1) Law Rep. 6 Ch. 602.

C. A. 1883 *Ex parte* FOSTER. *In re* FOSTER. C. J. B.

the 16th of October he tacitly assented to the arrangement then made. I desire it to be understood that I pronounce no opinion upon the state of circumstances upon which the case has been most argued. The only question is one under the statute, as to the course to be taken by the Court when the debt, being of an amount sufficient to sustain an adjudication, is admitted. The Court might have suspended the proceedings on the summons. This the Registrar did not do, but on the grounds that have been stated he thought the proceeding an improper one, and so dismissed the summons. That, in my opinion, was wholly beyond his authority, and, following the decision in *Ex parte Ellis* (1), I hold that, a sufficient debt having been admitted, the Registrar ought not to have dismissed the summons, although he might have stayed the proceedings. All that I can do therefore is to discharge the order appealed from; but I discharge it without costs.

J. B. D.

From this decision the debtors appealed.

The appeal was heard on the 8th of February, 1883.

Winslow, Q.C., and *S. Taylor*, for the Appellants:—

The Registrar of the County Court and the Chief Judge found as a fact that *Heilbut* had assented to the resolutions of the meeting. By his conduct he has precluded himself from issuing a debtor's summons, and his firm are in the same position.

But the resolutions amounted in effect to a legal agreement between the debtors and all their creditors (including *Heilbut & Co.*), which would have been an answer to an action by any of the creditors for his debt: *Tatlock* v. *Smith* (2); *Good* v. *Cheesman* (3). The Chief Judge based his judgment on *Ex parte Ellis*, but that was a different case from the present. There there was an absolute judgment debt and only an alleged right of set-off by the debtor, and it was held that there was no ground for staying the proceedings on a debtor's summons for the judgment debt. Here the issuing of the debtor's summons stopped the completion of the deed of assignment. It was not necessary

(1) Law Rep. 6 Ch. 602. (2) 6 Bing. 339.
(3) 2 B. & Ad. 328.

that the resolutions should be signed; it is sufficient that the creditors agreed, and that the debtors acted on the resolutions. The property was handed over by the debtors to the trustees; this was a part performance of the agreement. In equity such an arrangement amounts to a satisfaction of the debts: *Whitmore* v. *Turquand* (1).

[JESSEL, M.R.:—The question in the present case is whether there was ever any agreement at all; in *Whitmore* v. *Turquand* an agreement was implied.]

An agreement is to be implied from the *cessio bonorum*. The creditors who were present at the meeting were bound. An assignment for the benefit of all creditors who shall come in and assent to it is valid. There was an agreement amounting to an accord and satisfaction, and if so, the debtors were "not indebted" to *Heilbut & Co.* within the meaning of sect. 7 of the Act. There being a part performance of the agreement the *Statute of Frauds* does not apply. The debtors' property was handed over to the trustees at the request of the creditors, and after that it would be most inequitable for every creditor to issue a debtor's summons for his debt: *Robson's* Bankruptcy (2), and the cases there referred to. Mr. *Robson* says: "If the creditor consents to the postponement of the payment, or giving security beyond the prescribed time allowed for payment, he will not be able to avail himself of the omission to pay as an act of bankruptcy. And the same consequences will follow if the creditor takes any step which prevents or imposes a legal difficulty in the way of the debtor's complying with the summons." *Heilbut & Co.* are in no better position than any other creditor.

Cooper Willis, Q.C., and *F. Cooper Willis*, for *Heilbut & Co.*, were not heard.

JESSEL, M.R.:—

The first point to be considered is the meaning of the 7th section of the *Bankruptcy Act*, 1869, and, with great deference to the Chief Judge, I think there are some expressions in his judgment

(1) 1 J. & H. 444; 3 D. F. & J. 107.
(2) 4th Ed. p. 167.

C. A. 1883 *Ex parte* FOSTER. *In re* FOSTER. Jessel, M.R.

which appear to shew that he put rather too narrow a construction on that section. It is important to consider what the true construction is, because I should be sorry to have it supposed that the Court of Bankruptcy is restricted in the manner in which he seems to have considered it is with regard to the dismissal of a debtor's summons. When we look at the words of the section we must consider the object of it. The object was to compel a man to commit an act of bankruptcy, if he could not pay his debts. What kind of debts? Clearly debts for which an action could be maintained at common law, and for which the man was then liable. If the man shews that the alleged debt is not then payable, clearly that is not a debt for which an action could be maintained. It never could have been the meaning of the Legislature *à priori* that a man could be compelled to commit an act of bankruptcy under this section for a debt for which an action could not be maintained. And it must be remembered that wherever you could formerly restrain an action on equitable grounds, you can now defend the action on the same grounds, and therefore the distinction between an action which can be maintained at law and which can be restrained in equity, and an action which cannot be maintained at law has now absolutely disappeared. Now, remembering this, what is a debtor's summons to be granted for? Sect. 7 says that "a debtor's summons may be granted by the Court on a creditor proving to its satisfaction that a debt sufficient to support a petition in bankruptcy is due to him from the person against whom the summons is sought, and that the creditor has failed to obtain payment of his debt, after using reasonable efforts to do so."

Now there are two things mentioned. The debt must be sufficient to support a petition in bankruptcy, and the creditor must have used reasonable efforts to obtain payment. A debt is not sufficient to support a petition in bankruptcy unless it is a debt then payable. It must be not only a debt, but an exigible debt. To take a very common illustration, a debt barred by the *Statute of Limitations*, there is no doubt the debtor need not pay it, and if he does not it will not support a petition in bankruptcy, and it cannot be said that the creditor has failed to obtain payment of the debt after using reasonable efforts to do so. That is a debt

which is barred, as we call it, by the *Statute of Limitations*, though it is still a debt. Such a debt will not support a debtor's summons. I will give another illustration. Suppose there is a mortgage for a term of five years, that is, the mortgage deed contains a covenant by the mortgagee not to sue during the five years, provided that the interest is regularly paid. In such a case there would be a debt, but the covenant not to sue would be a good defence to an action for it, and a sufficient ground for restraining an action. Can it be supposed that you could have a debtor's summons for it? It would not support a petition in bankruptcy, because it would not be due in the sense of being payable, nor could it be said that the creditor had failed to obtain payment after using reasonable efforts to do so. He could not obtain payment at all if the interest was regularly paid. Now, that being so, the next clause of the section is: "Any debtor served with a debtor's summons may apply to the Court, in the prescribed manner and within the prescribed time, to dismiss such summons, on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted to such amount as will justify such creditor in presenting a bankruptcy petition against him; and the Court may dismiss the summons, with or without costs, if satisfied with the allegations made by the debtor." What does "not indebted" mean? It means that he is not indebted *modo et formâ*—that he is not indebted in a sum sufficient to support a petition in bankruptcy and of which the creditor has failed to obtain payment after using reasonable efforts to do so. That is what it must mean. It means not indebted in a sum of money which the debtor is then liable to pay, and it does not matter what is the ground of non-liability, legal or equitable. And this is shewn still more clearly by what follows as to the way in which the question of the debt is to be decided if doubtful, because it may be decided in an action. The Court "may upon such security (if any) being given as the Court may require for payment to the creditor of the debt alleged by him to be due, and the costs of establishing such debt, stay all proceedings on the summons for such time as will be required for the trial of the question relating to such debt; provided that, when the summons shall have issued from the *London* Court of

C. A. 1883

Ex parte FOSTER. *In re* FOSTER.

Jessel, M.R.

Bankruptcy such trial shall be had either before such Court or before any other Court of competent jurisdiction, and when the summons shall have issued from a County Court, before such Court in all cases in which it has now jurisdiction, and in all other cases before some competent tribunal." Consequently, it is to be tried in an action when it is not tried before the Bankruptcy Court. Then, if there is a verdict and judgment for the Defendant, is not the debtor's summons to be dismissed? Any other construction would allow the debtor's summons to go on, though there was a good defence to the action. If there are equitable grounds which would entitle a Court of Equity to restrain an action for the debt, those equitable grounds would equally prevent the creditor from proceeding in bankruptcy, and they are good grounds for dismissing the summons because there is no debt presently payable. If the conduct of the creditor has been such as to deprive him of the right to the then payment of the debt his summons ought to be dismissed. It would be cruel to put any other interpretation upon the section, for you could make a man a bankrupt who could not be sued for the debt. If, then, the Appellants have any equity it can be enforced now.

But then the question arises whether the Appellants have any equity? The difficulty in their way is that they must shew some agreement binding on the creditor which prevents him from requiring the present payment of his debt. Unfortunately the resolution passed at the meeting of the creditors was not binding on the absent creditors. That is admitted. I will assume for the present purpose that the resolution was assented to by the creditors who have issued the debtor's summons. The meeting was attended by a large majority of the creditors, and it is asserted that a contract was arrived at which was valid at common law. It is not a contract binding under any statute, and therefore the Appellants are compelled to assert that it was a contract binding at common law. But, in the absence of any signed deed, the questions are: First, was there any agreement at all? Secondly, was it an agreement binding at common law? Thirdly, is there any statute which prevents it being binding? Fourthly, is there any means of getting over the difficulty which arises under the *Statute of Frauds?*

C. A.
1883
Ex parte FOSTER.
In re FOSTER.
Jessel, M.R.

Now it appears to me there never was any agreement at all. What happened was this:—[His Lordship read the resolution.] The debtors were present, and it is said they assented to the resolution. That I have assumed. Now what was the bargain? The only bargain was a resolution, passed with the assent of all the creditors present, that there should be an assignment of the whole of the debtors' effects to certain trustees with certain powers. How could that be unless all the creditors should come in? The object was no doubt that they should come in, because otherwise the creditors would not get the benefit of the assets, and Mr. *Wright* could not get his discharge. The obvious meaning of it is that all the creditors should come in, and then Mr. *Wright* would get his discharge on paying £200, and then, and not till then, could the resolution be carried out by the trustees carrying on the business for the benefit of the creditors, *i.e.*, of all the creditors, which was obviously intended. I daresay it was supposed, as Mr. *Winslow* put it, that those creditors who were absent would come in, or that, if they would not, some of the creditors who were present would buy them out, and in that way get the assent of all the creditors. That was the bargain, and no doubt it was intended that they should all come in and be bound, for in no other way was it possible that the resolution should be carried into effect. As they did not all come in, it appears to me there has never been any bargain at all, *i.e.*, any final agreement. There was an attempt to come to an agreement, which has failed. That is one difficulty, and it is enough to dispose of the case.

But there are some other difficulties. Amongst the property was the leasehold factory of the debtors, which, of course, could only be made the subject of contract on compliance with the provisions of the *Statute of Frauds*. Now there is no pretence that the creditors in question ever signed anything. Nobody signed anything, except the chairman of the meeting. The debtors did not sign anything, and they were not bound any more than the creditors. It was attempted to get over this difficulty in two ways. In the first place, it was said that the chairman had an implied authority to sign for all the creditors. There is no evidence of such an authority, and the mere fact of a man's being appointed

C. A. 1883 *Ex parte* FOSTER. *In re* FOSTER. Jessel, M.R.

chairman of a meeting of creditors certainly does not give him, by common law, or any other law, the right to sign contracts for them, and there is not a particle of evidence of any special authority. Under these circumstances it appears to me that that proposition is not made out.

Then it is said that the next day the debtors gave up their stock-in-trade, &c., and books to the trustees. They never executed any document, it is true, but the trustees took possession and sold the property, and that is part performance sufficient to take the case out of the *Statute of Frauds*. The answer to that is, it is not a part performance. In the first place, the trustees were not trustees under the resolution until the deed of assignment was executed. There is no appointment of trustees as there is under the *Bankruptcy Act*. They are simply the nominees of the creditors to whom the assignment was to be made, but, until the assignment was made, there was no power or authority conferred on them at all. There was no power to take the property from the debtors in the way they did without any deed of assignment, and no power whatever to deal with the property. What they did was not authorized by the creditors.

Well, that being so, the acts of the trustees could not make that an agreement which was not an agreement at all, nor were those acts evidence of an agreement. But there is another point about this. The doctrine of part performance is founded on a change of possession, which is assented to by that party to the contract who is sought to be charged. It cannot be alleged by him that he is a trespasser. You refer his possession, if you can, to a legal origin, and you can do that by implying a contract. But you cannot make a contract by the act of a third party, who is no party to the contract itself. For instance, if *A.* and *B.* contract that *A.* shall sell an estate to *B.*, and *B.* takes possession of it, that is evidence against *B.* of a contract by him to buy the estate, for otherwise he would be a wrongdoer. But if *A.* and *B.* agree that an estate shall be settled on *C.* for life, with remainder to *B.*, and *B.* gives possession to *C.*, that is not evidence against *A.* And that is really what took place here. The bargain was that the property should be conveyed to *C.* But how can the fact of *C.* being put into possession by *B.* be evidence that *A.* gave up

his debt? It is plain that *A.* is not a party to the taking possession; and he is not a trespasser, and consequently, as against him, the giving of possession to the persons who are to be trustees is no evidence whatever of a contract on his part, and is not part performance by him. That puts an end to the notion that there is anything to take this case out of the *Statute of Frauds.*

Then, it is said, that *Heilbut* knew what was done and stood by. First of all, he did not stand by for long, because he took out this debtor's summons a few days after the transaction. But if he stood by, that does not raise any case of acquiescence which can deprive him of his legal rights. How could he prevent the debtors from giving up their property? They were masters of their own property, and how can it be said that he stood by and acquiesced in a state of things to which he was not a party, and which he had no power to prevent? He did not really stand by, and there is no pretence for raising such an equity against him. No doubt what has happened is felt by the Appellants to be a hardship. These are technicalities to a certain extent, and I have no doubt the thing would have gone all right, had it not been for the unfortunate accident about the debtors' books. I think that is very likely. I think the creditors who were not present at the meeting would have been bought out, and the arrangement would have been carried into effect.

Mr. *Winslow* argued that it is the same thing as if the deed had been executed. That, however, has not been done. I have no doubt that the trustees would never have accepted the leasehold property, for if they had accepted it, they would have been under an obligation to perform the covenants contained in the lease. I have no doubt that if it was worth having they would have got an underlease; if it was not worth having it would not have been accepted at all, and the creditors would have proved under the deed as altered. But that is not the bargain. Though I have no doubt it would have been so in fact, that was not the arrangement, and therefore I am not at all prepared to assume, no deed having been executed, that the trustees would have been willing to carry out the resolution in this form. Whatever might have been the result if other events had not intervened, I am by no means prepared to admit that the non-execution of the deed

C. A. 1883

Ex parte FOSTER. *In re* FOSTER.

was a mere matter of form, and not a real variation from what was intended.

On the whole it appears to me that there is no contract whatever with the creditors, and nothing to prevent the Respondents from issuing a debtor's summons. The appeal must be dismissed, and the order of the County Court dismissing the debtor's summons set aside.

LINDLEY, L.J.:—

I am of the same opinion. The debtor's summons was taken out by *Heilbut, Symons, & Co.*, in which firm Mr. *Heilbut* is a partner. It is objected that the summons ought to be dismissed on several grounds, which are in fact reducible to two; first, that the debtors are not indebted to the firm in the sum alleged; and, secondly, that, if they are indebted to the firm, one of the partners in it has so conducted himself as to preclude the firm from taking these proceedings. These are the two main points.

Now, with respect to the debt, I quite agree in the observations made by the Master of the Rolls on sect. 7 of the *Bankruptcy Act*, and I do not intend to repeat them. When it is said that "a debtor's summons may be granted on a creditor proving that a debt sufficient to support a petition in bankruptcy is due to him," I understand the words "is due" to mean, is enforceable against him. I understand the words in that sense, and the Master of the Rolls has given reasons in which I concur why they must be so understood. And when the latter part of the section says that the debtor may apply to the Court to dismiss the summons "on the ground that he is not indebted" to the summoning creditor, I understand the expression "is not indebted" in a similar way; that is, as meaning that he is not indebted in such a way that he can then be made to pay, and anything which amounts to a defence in that sense to an action will prevent his being indebted within the true meaning of sect. 7. I do not think the words ought to be read in the restricted technical sense of similar words in pleadings at common law.

Now, if we ask whether *Heilbut & Co.* are creditors of the debtors in the sense in which they must be to establish a debt, the answer must of course be "Yes;" unless what has taken place

with reference to the meeting of creditors justifies the debtors in insisting that the answer ought to be "No." Now what has taken place appears to me to be in substance this. There was a meeting of creditors, and at that meeting Mr. *Heilbut*, one of the partners in the Respondents' firm, was present. A resolution was then come to, which was reduced into writing and signed by the chairman. There is a conflict of evidence on the question whether Mr. *Heilbut* assented to the resolution or not. The Registrar who heard the case came to the conclusion that he did assent. I am not at all sure that I should have come to the same conclusion. So far as I can judge from the evidence, it appears to me extremely doubtful whether he ever did assent. But, assuming that he did, what is the legal consequence of his doing so? Suppose before the *Judicature Act* passed *Heilbut & Co.* had brought an action against the debtors for their debt, could the debtors have obtained an injunction in equity to restrain the action? I think that is a fair way of testing it. Legal defence, I take it, there would have been none. That seems to me so obvious that I do not think it is worth while to pursue the question. Could the debtors have obtained an injunction to restrain the action? It appears to me, on the facts which we have before us, that they could not.

There are some technical objections arising out of the *Statute of Frauds*, and I feel the force of all the observations which have been made by the Master of the Rolls with reference to that part of the subject. But, looking at the case on a broader ground, it appears to me that nobody was bound by the resolution until something more had been done. It was a mere preliminary arrangement. Another step was contemplated, viz., that a deed which would have enabled the debtors to get their discharge should be prepared and executed by everybody. But things never got to that length, and it appears to me, upon the language of the resolution alone, that it was a mere preliminary step, and not a concluded agreement which precluded any creditor from bringing an action for his debt. That being so, of course nine-tenths of the difficulties disappear.

It is only necessary to allude shortly to the other argument that Mr. *Heilbut*, who was present at the meeting, has so con-

C. A. 1883 *Ex parte* FOSTER. *In re* FOSTER. Lindley, L.J.

ducted himself as to render it inequitable or unjust on the part of his firm to enforce their debt. I think that argument also fails. In the first place, I should feel some little difficulty in holding the firm bound at law or in equity on the ground that one of the partners had done something which would make it unfair for him to sue for the debt if he alone were suing. I think it would be difficult to bind the firm by anything of that kind. But it appears to me that there has been no such conduct on his part, and for this reason: it is alleged (and Mr. *Tayler* put it in the only way in which it could be put) that the creditors have disabled the debtors from paying their debts. But the answer to that is conclusive. The creditors did nothing of the sort. The handing over by the debtors of their business and assets to the trustees was entirely premature. It was never contemplated by anybody that this should be done before the other creditors had come in. It was not anticipated. I do not doubt that everybody supposed all would go well, and the thing was done as a matter of course. But, when you come to consider whether that which was done is sufficient to preclude the Respondents from enforcing their debt, the legal answer must be "No." On these grounds it appears to me that the order of the Chief Judge was right, and that the appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors for Appellants: *Gregory, Rowcliffes, & Co.*, agents for *W. L. Welsh & Son, Manchester.*

Solicitors for Respondents: *Tamplin, Tayler, & Joseph.*

W. L. C.

Ex parte WALKER. *In re* McHENRY.

C. A.
1883
Feb. 22.

Liquidation Petition—Power to adjudicate Debtor a Bankrupt—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 12.

The power given to the Court by sect. 125, sub-sect. 12 of the *Bankruptcy Act*, 1869, to adjudge a debtor who has filed a liquidation petition a bankrupt, may be exercised even though no liquidation or composition resolutions have been passed by the creditors.

THIS was an appeal from the refusal of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, to make an adjudication of bankruptcy against *James McHenry*.

On the 15th of August, 1879, *McHenry* filed a liquidation petition. In the request which he delivered to the Registrar, giving the names of creditors to whom he desired that notices of the first general meeting of creditors might be sent, he stated the names of creditors whose debts amounted to more than £1,000,000, among which were the *Erie Railway Company* for £268,989. The £268,989 was the amount due by him under a judgment of *Jessel*, M.R., in an action of *Jewitt* v. *McHenry*. The first meeting of the creditors was held on the 20th of October, 1879. The following resolution was then passed: "That the meeting be adjourned to the 15th of December, 1879. That having heard an explanation as to the debtor's position with reference to the pending appeal against the judgment of the Master of the Rolls in the suit of *Jewitt* v. *McHenry*, this meeting is of opinion that it is inexpedient in the interest of the creditors that the statement of affairs produced by the debtor should be now read, and resolved, that such statement be handed to the receiver to be retained by him and produced, together with any amended or other statement of affairs." On the 15th of December, 1879, the adjourned meeting was held, and a similar resolution was passed, adjourning the meeting to the 12th of January, 1880. On that day it was again adjourned in the same way, and this process was repeated again and again, the meeting being ultimately, on the 15th of November, 1882, adjourned by a similar resolution to the 28th of March,

C. A. 1883 — *Ex parte* WALKER. *In re* McHENRY.

1883. No resolutions for liquidation by arrangement or composition were passed. The appeal from the decision of the Master of the Rolls in *Jewitt* v. *McHenry* was heard in March, 1881, and was dismissed. *McHenry* presented an appeal to the House of Lords, but that appeal had not been heard when the present appeal was heard.

On the 30th of January, 1883, an application was made to the Court by motion on behalf of *Walker & Co.*, *H. J. Walter*, and *H. Brown*, persons who claimed to be creditors of the debtor, and Mr. on the request whose names had been inserted by the debtor in a list which he delivered to the Registrar as to notices of a forthwith meeting of creditors, asking that the debtor might be forthwith adjudicated a bankrupt, under the power given to the Court by sub-sect. 12 of sect. 125 of the *Bankruptcy Act*, 1869. The debts of *Walker & Co.* and *Brown* were disputed. That of *Walter* was admitted, but he had at an early stage of the proceedings appointed the debtor's solicitor his proxy in the matter, and this proxy had not been revoked, and the debtor's solicitor had as *Walter's* proxy voted in favour of the resolutions for adjournment. *Walter* said that this had been done without his knowledge. *Walker & Co.* and *Brown* had not voted for the adjournments.

The Registrar refused the application, on the ground that sub-sect. 12 did not give the Court power to make an adjudication when resolutions for a liquidation or a composition had not been passed. The applicants appealed.

Winslow, Q.C., and *Sidney Woolf*, for the Appellants:—

The resolutions which have been passed are utterly illegal, the only object is to delay the creditors. The Court has jurisdiction under sub-sect. 12 of sect. 125 (1), now to adjudicate the debtor a bankrupt, although no resolutions for liquidation by arrangement or composition have been passed.

(1) Sect. 125, sub-sect. 12: "If it appear to the Court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

Creditors have power to adjourn a meeting in a reasonable way: *Ex parte Till* (1); but they cannot go on adjourning for ever as they have done here.

[They were stopped by the Court.]

Edward Clarke, Q.C., and *Finlay Knight*, for the debtor:—

Sub-sect. 12 of sect. 125 does not apply when no liquidation or composition resolutions have been passed; rule 266 or rule 267 of the Bankruptcy Rules, 1870, may apply, but the application does not purport to be made under those rules.

[JESSEL, M.R.:—The rules cannot control or supersede the Act.]

The Appellant *Walter* has, by his proxy, voted for all these adjournments. He has never withdrawn his proxy paper and he is bound by the acts of his proxy. He has no *locus standi* to make the application.

[*Winslow*, Q.C.:—The proxy is practically withdrawn by joining in this application.

JESSEL, M.R.:—You must confine your appeal to the other Appellants who have not given proxies.]

The Appellants whose debts are disputed have no right to make the application.

[JESSEL, M.R.:—The debtor mentioned them as creditors in the first instance. How can he be heard now to say they are not creditors at all?]

He is bound to mention all the persons who claim to be creditors.

JESSEL, M.R.:—

We all think that the construction put on sub-sect. 12 by the Registrar is not correct. We think it applies although no resolutions for liquidation by arrangement or composition have been passed. We, therefore, discharge the Registrar's order, and remit

(1) Law Rep. 10 Ch. 631.

C. A. 1883 *Ex parte* WALKER. *In re* MCHENRY.

the case to him that he may inquire whether *Walker & Co.* and *Brown* are creditors of the debtor, and if so, for what amount, and then deal with the application on its merits. We reserve the costs here and in the Court below.

BAGGALLAY and LINDLEY, L.JJ., concurred.

Solicitors for Appellants: *Munns & Longden.*
Solicitor for Debtor: *G. A. Sedgwick.*

W. L. C.

C. A. 1883 *Feb.* 22.

Ex parte ROBINSON. *In re* ROBINSON.

Bankruptcy Petition—Prior Scotch Sequestration—Jurisdiction to make Adjudication—Discretion of Court.

Though the Court has jurisdiction to adjudge bankrupt a debtor against whom there is existing a prior unclosed Scotch sequestration in which he has not obtained a discharge, the Court has a discretion in the matter, and it will decline to make an adjudication if it does not appear that the debtor has any assets in *England*, or any debts contracted since the commencement of the sequestration:—

Per JESSEL, M.R.:—*Primâ facie* the existence of a Scotch sequestration is a reason for declining to make an adjudication.

THIS was an appeal from an adjudication of bankruptcy made by Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy, against *R. W. Robinson.*

On the 28th of July, 1877, *B. J. Mayer*, a wine merchant, commenced an action against *Robinson*, to recover the sum of £26 13*s.*, the price of wine supplied to him. In May, 1880, *Robinson* went to reside at *Aberdeen* in *Scotland*, and on the 6th of August, 1881, by a decree of the Sheriff of *Aberdeen*, all his estate in *England*, *Scotland*, or elsewhere, was sequestrated as from the 27th of July, 1881. A trustee was appointed under the sequestration, and he took possession of all the debtor's assets in *Scotland.* The debtor had no real estate.

On the 28th of October, 1881, *Robinson's* solicitor wrote to *Mayer's* solicitor, informing him that *Robinson* had recently been

adjudicated a bankrupt under a Scotch sequestration. The Plaintiff's solicitor asked for an admission of the debt, but *Robinson* refused to give it.

On the 5th of November, 1881, the action came on for trial. The Defendant did not appear, and a verdict was found for the Plaintiff for £26 13*s.* and costs. The Defendant afterwards applied to have the judgment set aside, but without success. The costs were taxed at £89 2*s.*, and judgment for the debt and costs was signed on the 18th of February, 1882. On the 22nd of June, 1882, *Mayer* issued a debtor's summons against *Robinson* for the judgment debt. *Robinson* applied to the Court to dismiss the summons, and filed an affidavit in which he said that he was not indebted in the sum claimed. On the hearing of the application the Registrar declined to go behind the judgment, and dismissed the application. The summons was not complied with within the time limited, and *Mayer* then filed a bankruptcy petition against *Robinson*, founded on the judgment debt, and alleging the non-compliance with the summons as an act of bankruptcy. *Robinson* resisted the making of an adjudication on the ground that the Scotch sequestration had not been closed, nor had he obtained a discharge in it. The Registrar overruled the objection, and made an adjudication.

Robinson appealed.

Wyatt Hart, for the Appellant:—

There being a prior subsisting Scotch sequestration, in which *Mayer* could have proved his debt, the English Court had no jurisdiction to make an adjudication: *Royal Bank of Scotland* v. *Cuthbert* (1).

[JESSEL, M.R., referred to *Ex parte McCulloch* (2).]

That case is distinguishable. There there had been an adjudication in *Ireland*, and the Court made an adjudication in *England* only for what it was worth. Until the sequestration is closed all the debtor's assets vest in the Scotch trustee. The debtor swears he has no assets in *England;* how then can he frame a statement of his affairs?

(1) 1 Rose, 462. (2) 14 Ch. D. 716.

C. A.
1883
Ex parte ROBINSON. *In re* ROBINSON.

B. Houghton, for the petitioning creditor:—

An adjudication in *England* may be of some use. The debtor refused to admit my debt, and on the eve of the trial told my solicitor of the Scotch sequestration, and I was compelled to go on with the trial. The Registrar followed *Ex parte McCulloch* (1). I want to be able to examine the debtor and to set aside any transaction which he may have entered into here. My original debt could be proved in the Scotch sequestration, but the costs of the action could not, because the judgment was not signed till after the commencement of the sequestration.

J. E. Linklater appeared for the Scotch trustee.

The COURT held that he had no *locus standi*, and declined to hear him.

JESSEL, M.R.:—

About the jurisdiction to make an adjudication I have no doubt; *Ex parte McCulloch* settles that. Of course there must be some reason for exercising it, and the mere existence of a bankruptcy in *Scotland* or in *Ireland* would, *primâ facie*, be a reason for not exercising it. Here the Scotch sequestration is not closed; it does not appear that there are any subsequent debts, or any assets in *England*, and there is no reason for exercising the jurisdiction. An adjudication would be altogether a vain thing. It might embarrass the proceedings in *Scotland*, and could be of no use to any one. I am of opinion, therefore, that there ought not to be an adjudication. I cannot, however, commend the debtor's conduct, and therefore, though the Registrar's order must be discharged, no costs will be given.

BAGGALLAY, L.J.:—

I am of the same opinion. I entertain no doubt whatever of the jurisdiction to make an adjudication, notwithstanding the Scotch sequestration. I go further, and say that *primâ facie*, there being a good petitioning creditor's debt and an act of

(1) 14 Ch. D. 716.

bankruptcy proved, the Court would make an adjudication if there were any assets in *England*. But, under the circumstances of the present case, I see no ground for doing so.

C. A. 1883 *Ex parte* ROBINSON. *In re* ROBINSON.

LINDLEY, L.J.:—

I am of the same opinion. I cannot see what good an adjudition would do.

Solicitors: *P. W. Nazer; A. G. Ditton; Travers Smith & Braithwaite.*

W. L. C.

V.-C. B.
1883
Jan. 25.

In re GALE.
BLAKE *v.* GALE.

[1882 G. 585.]

Mortgagor and Mortgagee—Executor—Devastavit—Statute of Limitations.

Testator mortgaged an estate to Plaintiffs, and devised it to three executors upon trusts in favour of his daughters, and after the death of all his children for sale.

The executors distributed the whole personal estate without providing for the mortgage debt. After this one of the executors died. The daughters occupied the farm for twenty years after the distribution of the personal estate paying rent to the executors, and until 1880 paying the interest on the mortgage. The mortgagees then brought an action for foreclosure or sale, and claimed to have any deficiency made good by the two surviving executors and the executors of the deceased executor :—

Held, that any claim founded on the *devastavit* in distributing the personal estate was barred after six years, but that the Plaintiffs were entitled to foreclosure and to an order for administration of the mortgagor's estate.

BY indenture of the 30th of August, 1843, *William Gale* mortgaged (subject to a prior mortgage thereon for £12,000) the manor of *North Fambridge* and the manor-house, lands, and hereditaments thereto belonging, to *T. M. Keith* and *J. J. Blake*, since deceased, as a security for £2400, with the usual covenant by the mortgagor for himself, his heirs, executors, and administrators, for payment of the principal money and interest as therein mentioned.

William Gale, by his will, dated the 12th of November, 1851, devised to the Defendants *Joseph Gale*, *James Theobald Gale* and *Richard Knight*, whom he appointed as his executors, the *North Fambridge* manor and estate, upon trust to permit his unmarried daughters to reside at and carry on the business of the farm so long as they should think proper and desire to do so, upon condition, nevertheless, that his daughters, during such time, should keep down the interest on any mortgages charged upon his said estate, and upon trust, in the events therein mentioned, to sell the said manor and estate, and (subject to the payments thereby directed) to pay and distribute the moneys arising therefrom, and

the rents and profits of the manor and estate until such sale, amongst his children equally.

By a codicil to his will the testator directed that the manor and estate should not be sold until after the death of all his children, but that in the event of the marriage of all his daughters, or their declining to carry on the farm business, the farm was to be let by the executors, who were, out of the rent of the farm, and the fines and other casual profits of the manor, to keep down and pay the interest on the mortgage debts of £12,000 and £2400 charged thereon, and to pay the surplus of the rent, fines, and casual profits unto all his children. And the testator thereby authorized and empowered his executors, in case the mortgage debts of £12,000 and £2400 should be called in before the time appointed for the sale of the estate, to raise such sums by a new or other mortgage or mortgages thereon, as they should deem most advantageous.

William Gale died on the 9th of July, 1859, leaving, in addition to real estate, personal estate of sufficient value to pay the mortgage debts, which was finally distributed, in December, 1861, with the knowledge of the mortgagees, among the beneficiaries by his executors *Joseph Gale*, *J. T. Gale*, and *Richard Knight*, all of whom proved the will. No provision was made by the executors for payment of the Plaintiffs' mortgage debt of £2400, which still remained due, with interest from the 30th of August, 1880, down to which date the interest had been paid by the daughters and afterwards by the husband of one of them, who had been in occupation of the farm at a beneficial rent.

Richard Knight, who took very little part in the executorship beyond proving the will, died in March, 1876, having, by his will of the 21st of March, 1874, appointed the Defendants *J. H. Trumper* and *George Gale* executors thereof.

In March, 1882, the Plaintiffs, who were the representatives of *Keith* and *Blake*, the mortgagees, issued a writ in this action on behalf of themselves and all other creditors of *William Gale*, for the purpose of obtaining an account and payment of their mortgage debt, and in default of payment a sale; and claiming, in case the proceeds of the sale should be insufficient, that the Defendants *Joseph Gale* and *J. T. Gale* personally, and the Defendants *J. H. Trumper* and *George Gale* (to the extent of the assets of their

V.-C. B. 1883 *In re* GALE. BLAKE *v.* GALE.

testator *Richard Knight*) might be ordered to make good and pay to Plaintiffs the deficiency. Administration of the real and personal estate of *William Gale*, and, so far as might be necessary, of *Richard Knight*, was also claimed.

By their statement of defence the Defendants *Joseph Gale* and *J. T. Gale* craved the benefit of the *Statute of Limitations*, and denied that they had been guilty of any *devastavit*, alleging that *Keith & Blake*, the mortgagees, who were solicitors at *Norwich*, were well aware of the testator's death and of the winding-up of his estate, and being content with the sufficiency of their security, acquiesced in the distribution of the residuary personal estate in 1861, and had never made any claim against the estate, nor made any application to the Defendants for principal or for interest until immediately before the commencement of this action; and that no part of the principal and no interest had been paid, and no acknowledgment of the right thereto had been given in writing signed by the person by whom the same was payable, or his agent, for more than twenty years before the institution of the action.

The Defendants *Trumper* and *George Gale* (the executors of *Richard Knight*) stated that their testator had received no part of the assets of the testator *William Gale* for his own benefit, and that if the other Defendants and *R. Knight* were in any degree liable to the Plaintiffs (which they did not admit) the other Defendants were primarily liable in exoneration of the estate of *Richard Knight*.

Marten, Q.C., and *W. Freeman*, for the Plaintiffs:—

The mortgage debt is not barred, as the payment of interest down to August, 1880, by the testator's daughter and the son in law who occupied the farm, is an acknowledgment within 3 & 4 Will. 4, c. 42, s. 5, which will keep the debt alive against, and bind, all persons interested either in the mortgaged property or in the other property of the testator, which was liable by reason of the covenant for repayment of interest: *Pears* v. *Laing* (1); *Roddam* v. *Morley* (2); *Toft* v. *Stephenson* (3); *Chinnery* v. *Evans* (4). The distribution of the testator's estate by the exe-

(1) Law Rep. 12 Eq. 41.
(2) 1 De G. & J. 1.
(3) 1 D. M. & G. 28.
(4) 11 H. L. C. 115.

cutors, who admittedly had knowledge of the mortgage debt, without providing for payment of it, was an absolute and unqualified breach of trust, in answer to which the *Statute of Limitations* furnishes no bar: *Fordham* v. *Wallis* (1); and as it is no part of mortgagees' duty to secure the due application of their mortgagor's personal estate, the Defendants cannot succeed against the Plaintiffs upon the ground of their having acquiesced in its distribution, which they never did in fact, though they took no steps so long as their interest was paid (2). With respect to *Knight*, if his co-executors have been permitted by him to commit a *devastavit*, he, and his estate in the hands of his executors, is equally liable to answer the breach of trust.

Hemming, Q.C., and *B. B. Rogers*, for the Defendants *Joseph Gale* and *J. T. Gale*:—

We do not dispute the propositions of law cited on behalf of the Plaintiffs from *Pears* v. *Laing* (3) and the other cases, but we say that they have no application to this case. The question is, whether the *Statute of Limitations* has or has not barred the Plaintiffs' remedy against the executors of the mortgagor for the alleged *devastavit*, not whether the remedy against the estate still survives, which we admit. The assets were distributed more than twenty years before action brought, with the knowledge and acquiescence, as we say, of the mortgagees, who were then satisfied that the estate was an amply sufficient security. But as the real foundation of the action is the alleged *devastavit*, the Plaintiffs' claim against the executors personally is a simple contract claim which is barred after six years: *Thorne* v. *Kerr* (4).

Begg, for the executors of *Knight*:—

We do not admit that there was any *devastavit*, and in any case *Knight*, who did not concur in it, is not liable: *Pemberton* v. *Chapman* (5). Even assuming that he was a concurring party to the *devastavit*, it took place more than twenty years ago, and the action "must be brought in the *detinet* only, and the judgment must be *de bonis testatoris*:" *Williams* on Executors (6). Being

(1) 10 Hare, 217. 17 Jur. 228
(2) Ibid. 232.
(3) Law Rep. 12 Eq. 41.
(4) 2 K. & J. 54. 2 Jur. N.S. 322
(5) 7 El. & Bl. 210. 5 Jur. N.S. 567
(6) 8th Ed. pp. 2007, 2061.

V.-C. B. 1883 *In re* GALE. BLAKE *v.* GALE.

executors of an executor we owed no specialty debt to the Plaintiffs, and the period of six years is an absolute bar to any claim in respect of the *devastavit*: *Thorne* v. *Kerr* (1); *Fordham* v. *Wallis* (2).

Marten, in reply:—

In addition to the ordinary foreclosure decree, we seek to make the Defendants *Joseph Gale* and *James Theobald Gale* personally liable to the extent of their shares (£365 7*s.* 11*d.*) in the testator's estate admitted to have been received by them.

[BACON, V.C.:—Your right may be against the beneficiaries who have had the estate distributed among them. In another suit that might be raised.]

Marten:—As part of the relief we ask that the real and personal estate of *William Gale* may be administered, and that would bring out what these Defendants have received personally, and also enable us to bring before the Court all the persons who have received anything beneficially, so as to make them refund.

BACON, V.C.:—You are entitled to a decree for what is due, and you are entitled to an order against the Defendants, in whom the equity of redemption is now vested, for foreclosure or sale, but not to an order that they are to pay you any deficiency. In case you do not get paid by that means it seems to me you are entitled to an administration of the estate in this creditors' suit. But you are not entitled, in my opinion, to any decree which involves the question of *devastavit*, because upon the authorities, and also upon the well-settled rule of law, if you sue upon a *devastavit*, that is personal against the executor, and is barred by the six years.

Marten, continued his reply upon the question of *devastavit*:—

In *Thorne* v. *Kerr* the question was as to charging the real estate of the person who was the executor and the representative for a certain time upon the footing of the *devastavit* committed—that person not being one of the original trustees, as in this case *Knight* was and the present Defendants are.

(1) 2 K. & J. 54. 2 Jur. N.S. 322 (2) 10 Hare, 217. 17 Jur. 2

In *In re Baker* (1) the executor of a person indebted upon a specialty having committed a *devastavit* in not providing for payment of the debt was held liable after a lapse of eighteen and a half years to make good the amount for which his testatrix was liable under her covenant.

BACON, V.C., after stating that the Plaintiffs were entitled to foreclosure or sale, and also to an order for the administration of the estate of *William Gale*, and observing that the suggested acquiescence by Plaintiffs in the distribution of the estate by the executors was not fairly and properly before him so as to enable him to found a decree upon it, proceeded thus:—

The Plaintiffs are mortgagees, and there is a covenant to secure their mortgage. Their mortgagor died in 1859. His estate has been dealt with ever since with knowledge more or less sufficient. The mortgagees were content to take the payment of their interest. They knew the daughters were going to be tenants at a rent, and they looked to them for payment of the rent, and afterwards they looked to *George Gale*, the husband of one of the daughters, received the interest from him, and gave him receipts for what they received. That may possibly be further inquired into some other day. I have nothing to do with that now. What was done then is no answer whatever to the covenant on which the Plaintiffs sue. The Plaintiffs have a covenant for the payment of the debt, and they have a right to a decree for the administration of the testator's estate. But I cannot go into the question of *devastavit*, which is hardly very distinctly prayed for, though very distinctly alleged in the claim. Lapse of time is an answer to that. The degree of knowledge on the part of the Plaintiffs does not signify, because the period of six years has elapsed, and the demand against the Defendants as executors in respect of a *devastavit* is, in my opinion, therefore barred, and I can make no decree which opens that question, or affords any relief in consequence of the alleged *devastavit*. Mr. *Knight*, whom this concerns more perhaps than anybody, died several years ago, and it is a good deal more than six years since the alleged *devastavit*. I think that is covered as well by the case last cited (*In re Baker*) as

(1) 20 Ch. D. 230.

V.-C. B. 1883 *In re* GALE. BLAKE *v.* GALE.

by the case before Vice-Chancellor *Wood* (*Thorne* v. *Kerr* (1)); and there can be no relief whatever granted against him, nor is there any evidence that *Knight* ever claimed as executor otherwise than by proving the will. And if that was all he did that would not make him liable under any circumstances.

A decree was accordingly made for foreclosure of the mortgage, and for the administration of the estate of *William Gale.*

Solicitors: *Duffield & Bruty; Blake & Heseltine,* for *Keith, Blake, & Co., Norwich.*

(1) 2 K. & J. 54.

F. G. A. W.

FRY, J.
1883
Feb. 3.

In re FRASER.
YEATES *v.* FRASER.

[1878 F. 132.]

Charity—Scheme—Attorney-General—Application to Scotch Court.

An English testator bequeathed the residue of his estate to his executors, and to trustees to be appointed by them, on trust for the benefit of the blind in *Inverness-shire*. The surviving executor declined to act in the trust, or even to appoint new trustees:—

Held, that the Attorney-General, and not the surviving executor, was the person to whom liberty ought to be given to apply to the Court of Session in *Scotland* for the settlement of a scheme for the charity.

THIS action was brought by a legatee for the administration of the estate of *Donald Fraser*, and the execution of the trusts of his will.

The will of the testator, dated the 15th of October, 1875, contained (*inter alia*) the following provisions: "I hereby nominate and appoint the treasurer and trustees of the '*Donald Fraser*' bequest to the blind in *Inverness* to be my residuary legatees. And I hereby direct my trustees to allow my estate to remain invested as it may be when it comes into their hands, or convert it into money, but when any portion is so converted into money it shall immediately thereafter be invested in British Government securities, or approved railway debentures, or heritable securities in *Scotland*, and I leave it to my executors, and two or more trustees appointed by them, in trust to be invested for the benefit of the blind in *Inverness-shire* in such manner as they may deem best, but I wish the capital to be intact, and the interest only employed." And the testator appointed his wife and *C. L. Denton* to be the executors of his will. The testator was a native of *Scotland*, but he had for many years resided at *Hampstead*, near *London*. He died on the 7th of July, 1878.

On the 15th of November, 1878, an administration judgment was pronounced.

The action came on for further consideration on the 8th of November, 1882. The testator's widow was dead, and it

FRY, J.
1883
In re FRASER.
YEATES *v.* FRASER.

appeared that *Denton* did not desire to act as a trustee of the residuary estate of the testator for the benefit of the blind in *Inverness-shire*, or even to appoint new trustees, and the Court made a declaration that the residue was effectually given to the testator's executors and two or more trustees to be appointed by them, in trust for the benefit of the blind in *Inverness-shire*. And the Court directed a reference to the Court of Session in *Scotland* to settle a scheme for the administration of the charity. The minutes of the order as settled by the Registrar contained the following: "It is ordered that the Defendant *C. L. Denton* be at liberty to make such application to the Court of Session in *Edinburgh* with reference to the application of the testator's residuary estate for the benefit of the blind in *Inverness-shire* and the settlement of a scheme for that purpose or otherwise as the Judge in Chambers may direct."

The Attorney-General desired that the liberty to apply to the Scotch Court should be given to him, and not to *Denton*.

The matter was now mentioned to the Court.

Cozens-Hardy, Q.C., and *E. Ford*, for the Defendant *Denton*:—

The minutes are right as they stand. The Defendant was selected by the testator; the Attorney-General does not represent the Crown in *Scotland*, and has no right to see to the administration of the fund there: *Attorney-General* v. *Sturge* (1); *Forbes* v. *Forbes* (2).

Stirling, for the Attorney-General:—

The Attorney-General is the proper person to take the proceedings in *Scotland;* it is his duty to see that the fund gets into the proper channel. If he is not appointed he will have to attend the proceedings in chambers in order to see that the Defendant does his duty, and this will increase the expense.

Cozens-Hardy, in reply:—

The order may contain a positive direction to the Defendant to make the application in *Scotland*. Liberty to apply is

(1) 19 Beav. 597. (2) 18 Beav. 552.

reserved. The scheme will not be settled in your Lordship's chambers.

[FRY, J.:—Till the scheme is settled there will be a charity fund in *England* unadministered.]

Only one attendance in Chambers would be necessary on a summons to pay out the fund in accordance with the directions of the Scotch Court.

FRY, J.:—

The question is simply one of convenience, who is to be at liberty to apply to the Scotch Court to settle the scheme. In favour of the Defendant it is urged that he is the person appointed by the testator as trustee, but he has not thought fit to assume the duty confided to him by the testator. If the order gives him liberty to make the application there will be nothing to compel him to make it. He is not a public officer, and in the event of his death there will be no one to carry on the matter. On the other hand, if I appoint the Attorney-General, he is a public officer who has a continuity of existence and a duty to the public to perform. I think, therefore, it will be more convenient to appoint the Attorney-General. Moreover, if the Defendant is appointed, the Attorney-General will have to attend in Chambers, and this will add to the expense. I shall, therefore, give the liberty to make the application to the Scotch Court to the Attorney-General.

Solicitors: *Drake, Son, & Parton; Hare & Co.*

W. L. C.

FRY, J.

1883

Jan. 30;
Feb. 5.

FRANCE *v.* CLARK.

[1881 F. 1262.]

Company—Shares—Pledge—Blank Transfer—Power of Pledgee.

The registered holder of shares in a company, whose articles of association did not require that a transfer of shares should be made by deed, deposited the certificates of his shares, accompanied by a transfer executed by himself, but with the name of the transferee and the date of execution left in blank, with a person who advanced him money, as security for the loan. No time was fixed for the repayment of the loan, and nothing was said as to the object of the transfer:—

Held, that the depositee had no authority, without a previous demand for repayment of the loan, to sell or sub-mortgage the shares and fill in the name of the purchaser or sub-mortgagee as transferee.

Ex parte Sargent (1) distinguished.

The rules as to the power of sale possessed by the pledgee of a chattel apply also to to the pledgee of a *chose in action*.

Affirmed on appeal W.N.(84)143 Ca

On the 10th of February, 1881, the Plaintiff, who was the registered holder of ten fully paid-up shares in the *Anglo-Egyptian Banking Company*, deposited the certificates of the shares, together with a transfer of them executed by himself, in which the name of the transferee and the date of execution were left in blank, with *F. A. Clark*, as security for a sum of £150 then advanced by *Clark* to him. Nothing was said as to the time at which the loan was to be repaid, or as to the object of the blank transfer. The articles of association of the company did not prescribe any form in which transfers of shares were to be made, but they contained a provision that all transfers of shares should be subject to the approval of the directors. Afterwards *Clark* deposited the certificates and the blank transfer with *W. G. Quihampton*, as security for a sum of £250, which *Quihampton* had previously lent to *Clark*. In April, 1881, *Clark* died insolvent. On the 22nd of June, 1881, *Quihampton* inserted his own name in the transfer as transferee, and also inserted the date, and on the 24th of June he sent the transfer to the bank for registration. The bank on the 25th of June, on the receipt of this transfer, wrote to the Plaintiff informing

(1) Law Rep. 17 Eq. 273.

him of it, and added that if the transfer was correct he need not reply. The Plaintiff then consulted his solicitors, and they on the 27th of June wrote to the bank, telling them that the Plaintiff claimed the shares, and asking them not to register the transfer without further notice to the writers of the letter. On the same day the solicitors wrote to *Quihampton* giving him notice of the Plaintiff's claim. The practice of the directors of the bank was not to give any formal approval of a proposed transfer of shares, but a certificate of the shares in the name of the proposed transferee was prepared, and the approval of the directors was given by one of the directors affixing his signature to the certificate. On the 30th of June, after the receipt of the Plaintiff's solicitors' letter, a certificate of the ten shares in the name of *Quihampton* was signed by one of the directors, but it was retained by the bank. The old certificate of the shares in favour of the Plaintiff was cancelled by one of the clerks in the office of the bank, but it did not appear when this was done. It was alleged by the Plaintiff that an entry of *Quihampton's* name as the owner of the shares was made in the register of the bank, but there was no evidence on this point. On the 15th of July, 1881, the Plaintiff's solicitors tendered to *Quihampton* the sum of £153 5*s.* 9*d.*, the amount of the original advance by *Clark* to the Plaintiff, with interest up to that date. The tender was not accepted. The Plaintiff then commenced this action against *Clark's* administratrix and *Quihampton*, claiming to have an account taken of what was due by the Plaintiff to *Clark's* administratrix on the security of the certificates, and that, upon payment of that amount to *Quihampton*, he might be ordered to deliver up the certificates and the transfer to the Plaintiff, and that, if necessary, the Defendants or one of them might be ordered to retransfer the shares to the Plaintiff.

Quihampton by his statement of defence claimed to hold the certificates and the transfer as a security for what was due to him from *Clark's* estate.

Cozens-Hardy, Q.C., and *A. R. Kirby*, for the Plaintiff:—

The delivery of the blank transfer did not confer on *Clark* any authority by implication to sell the shares and to fill up the

FRY, J.
1883
FRANCE
v.
CLARK.

blank with the name of the purchaser; the only authority was to fill in his own name as transferee by way of mortgage, and *Quihampton* had no greater authority than *Clark*.

The transfer could be of no avail till it had been approved by the directors, and before that was given both the company and *Quihampton* had notice of the Plaintiff's claim.

Glasse, Q.C., and *J. F. Popham*, for the Defendant *Quihampton*:—

The effect of the blank transfer was to give *Clark* full power to deal with the shares and to insert the name of any transferee, and even if *Quihampton* had had notice of all the facts he could have inserted his own name as transferee. And when by means of the registration he got the legal right as well as the equitable, the shares became his absolute property. At any rate the Plaintiff can redeem him only on paying what he advanced, with interest.

That a deposit of a blank transfer of shares, accompanied by the certificate, gives the depositee full power to deal with the shares and to give a good title to a purchaser, is shewn by *Ex parte Sargent* (1) and *Dodds* v. *Hills* (2).

The company could dispense with any formalities required for the approval of a transfer: *Buckley* on the Companies Acts (3). *Quihampton* had acquired the legal and the equitable right to the shares, and was entitled to demand the registration of the transfer, and nothing which the Plaintiff could do could deprive him of that right: *Ortigosa* v. *Brown* (4).

[FRY, J.:—Was not everything which was done by the directors inoperative until the certificate should be delivered out to the transferee? The signing of the certificate was treated as the approval of the transfer by the directors.]

The certificate was not delivered out, not because of any disapproval by the directors, but because of the notice given to the company by the Plaintiff's solicitors.

Herbert Lake, for the administratrix of *Clark*.

(1) Law Rep. 17 Eq. 273.
(2) 2 H. & M. 424.
(3) 4th Ed. p. 409.
(4) 47 L. J. (Ch.) 168.

Cozens-Hardy, in reply :—

Ex parte Sargent (1) has not much application to this case.

[FRY, J. :—There the Court held that the filling up of the blank in the transfer was in accordance with the original bargain.]

Here nothing was said on the original deposit as to the authority conferred on *Clark* to deal with the shares, and the question is whether a deposit of a chattel as a security for money lent, no day being fixed for its repayment, confers a power to sell the chattel, at any rate before a demand for repayment is made? *Pigot* v. *Cubley* (2) shews that it does not. The *onus* is on *Quihampton* to prove his authority. *Dodds* v. *Hills* (3) does not apply; it would apply if *Clark* had been registered as the owner of the shares. If *Dodds* v. *Hills* goes any further, it has been overruled by *Shropshire Union Railway and Canal Company* v. *The Queen* (4).

The practice of the company as to the approval of transfers by the directors is not inconsistent with the provisions of the articles; if it was it would be of no avail.

Feb. 5. FRY, J. (after stating the facts, continued :—)

Two questions arise. First, what was the effect of the deposit of the blank transfer with *Clark* together with the certificates of the shares? Did it confer on *Clark* a power to sell the shares, or did it only give him the right to complete his own title by registration, and to transfer his title as mortgagee of the shares? On principle I am unable to see why the deposit should confer a power of sale. As a general rule the pawnee of chattels has no right to sell them, unless a time was originally fixed for their redemption and that time has expired, or unless he has made a demand upon the pawnor for the payment of what is due to him. The law is thus laid down by Mr. Justice *Story* in his book on the Law of Bailments (5): "If there is no stipulated time for the payment of the debt, but the pledge is for an indefinite

(1) Law Rep. 17 Eq. 273.
(2) 15 C. B. (N.S.) 701.
(3) 2 H. & M. 424.
(4) Law Rep. 7 H. L. 496.
(5) 7th Ed. plac. 308.

FRY, J.
1883
FRANCE
v.
CLARK.

period, the pawnee has a right, upon request, to insist upon a prompt fulfilment of the engagement; and if the pawnor neglects or refuses to comply, the pawnee may, upon due demand and notice to the pawnor, require the pawn to be sold." I can see no reason why the principle which applies to a pledge of physical chattels should not equally apply to a pledge of a *chose in action*. It is said, however, that the point is determined in the Defendant's favour by *Ex parte Sargent* (1). The question in that case was as to the legal right of a person to be on the register of members of a company. *Fry* on borrowing money from *Cannon* had deposited with him as security the certificates of some shares and a blank transfer of the shares. *Cannon* deposited the certificates and the blank transfer with *Sargent* as security for a debt, and *Sargent* filled up the transfer with his own name, and sent it to the company for registration. The company, having received notice from *Fry* that he disputed the validity of the transfer, refused to register it, and *Sargent* applied to the Court to rectify the register of members by inserting his name instead of that of *Fry* as the holder of the shares. *Jessel*, M.R., granted the application, and he put the right of *Sargent*, not on any implied authority to *Cannon* to sell the shares, but on an implied power to transfer his mortgage. The Master of the Rolls said (2): "I have no doubt that without express words Mr. *Cannon* was authorized, and was intended to be authorized, by Mr. *Fry*, if necessary, to fill up the blanks, and get the shares registered. The object and meaning of the whole transaction was, that if the money was not paid, Mr. *Cannon* should do this. Mr. *Cannon*, like every other mortgagee, had a right to re-borrow, and to transfer his security." *Ex parte Sargent*, therefore, is not an authority for saying that a person who holds a blank transfer of shares, with the certificates, has a power of sale over the shares.

The next question is, Did *Quihampton* acquire the legal estate in the shares without notice of the Plaintiff's title? If he did, he would have a prior title to the Plaintiff. But the question is answered by the facts which I have already stated. The legal title could not be completed without the approval of the directors

(1) Law Rep. 17 Eq. 273. (2) Law Rep. 17 Eq. 279.

of the company, and that approval was not given at any rate till the 30th of June, before which day *Quihampton* had notice of the Plaintiff's claim. *Quihampton* has, therefore, not established his title as against the Plaintiff, except to the extent of the amount due from the Plaintiff to *Clark*. Therefore, on payment of the £153 5*s*. 9*d*. tendered by the Plaintiff before the writ was issued, *Quihampton* must do all acts necessary to obtain a transfer of the shares into the Plaintiff's name. And I give judgment for the Plaintiff's costs of the action against both the Defendants.

Solicitors for Plaintiff: *Edward Smith & Co.*
Solicitor for Defendant *Quihampton*: *P. Wilkinson.*
Solicitors for Administratrix: *Tucker & Lake.*

W. L. C.

DONNELL *v.* BENNETT.

[1883 D. 199.]

Contract—Chattels—Specific Performance—Injunction.

A contract for the sale of chattels to the Plaintiff contained an express negative stipulation not to sell to any other manufacturer.

The Court granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which specific performance would not have been granted.

Wolverhampton and Walsall Railway Company v. *London and North Western Railway Company* (1) considered.

BY an agreement dated the 15th of December, 1882, and made between the Plaintiff, *J. Donnell*, a manure manufacturer, of the one part, and *Cormack*, a fish curer and fish smoker, of the other part, it was agreed that *Cormack* should sell and that the Plaintiff should buy all parts of fish not used by *Cormack* in his business of a fish curer and fish smoker at the price of 23*s*. per ton for the space of two years from the 31st of December, 1882; and in consideration thereof *Cormack* further agreed that he would not sell during the said space of two years any fish or parts of fish to any

(1) Law Rep. 16 Eq. 433.

FRY, J.
1883
DONNELL
v.
BENNETT.

other manufacturer whatever; and the Plaintiff further agreed that he would take and pay for all fish or parts of fish which *Cormack* should deliver to him at the said price of 23*s.* per ton delivered at the Plaintiff's works.

It was admitted that the Defendant never delivered any fish or parts of fish under the contract to the Plaintiff, but that he entered into a contract with the Defendant *Bennett* to deliver all the parts of fish which he did not require in his business to *Bennett;* it was also admitted that the Plaintiff had suffered damage by this breach of contract, and that the Defendant *Bennett* had paid *Cormack* considerable sums of money to induce him to break his contract with the Plaintiff, in order that *Bennett* might obtain the substantial monopoly of all the refuse of fish in *Grimsby* or the neighbourhood.

This was an action by the Plaintiff against *Bennett* and *Cormack* as co-Defendants asking for an injunction to restrain *Cormack* from selling any fish to *Bennett* or any other manufacturers except the Plaintiff, and to restrain *Bennett* from buying any such fish from *Cormack.*

H. A. Giffard, Q.C., and *Hall,* for the Plaintiff:—

The Court will enforce the negative covenant: *Dietrichsen* v. *Cabburn* (1); *Lumley* v. *Wagner* (2); *De Mattos* v. *Gibson* (3).

[FRY, J., referred to *Fothergill* v. *Rowland* (4) and *Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (5).]

In *Fothergill* v. *Rowland* the judgment of the Lord Chancellor shews that the Court would have followed *Dietrichsen* v. *Cabburn* if there had been a negative covenant.

Specific performance may now be granted whenever it is just and convenient: *Judicature Act,* 1873, s. 25 (8).

Cozens-Hardy, Q.C., and *Williamson,* for the Defendants:—

The *Judicature Act* has not altered the practice of the Court:

(1) 2 Ph. 52.
(2) 1 D. M. & G. 604.
(3) 4 De G. & J. 276.
(4) Law Rep. 17 Eq. 132.
(5) Law Rep. 16 Eq. 433.

Day v. *Brownrigg* (1). This being a contract in respect of chattels having no peculiar value is not a contract in respect of which the Court of Chancery could have granted specific performance, it is a case for damages only and not for an injunction.

The insertion of a negative contract does not make any difference, for the negative contract is co-extensive with and is a simple restatement of the positive contract. This negative contract would have been implied in the positive contract—a negative stipulation not co-extensive with the positive contract can be enforced, *e.g.* a negative covenant in a lease or deed of partnership: *Brett* v. *East India and London Shipping Company* (2). *Morris* v. *Colman* (3) was decided on the ground of partnership.

Giffard, in reply:—

As to the effect of the *Judicature Act*: *Beddow* v. *Beddow* (4); *Thomas* v. *Williams* (5); a negative stipulation has been enforced though co-extensive with a positive covenant: *Hills* v. *Croll* (6); *Catt* v. *Tourle* (7).

FRY, J.:—

The question which arises is by no means an easy one. It is difficult because of the state of the authorities upon the point. It appears to me that the tendency of recent decisions, and especially the cases of *Fothergill* v. *Rowland* (8) and of the *Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (9), is towards this view—that the Court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract whether it contain or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is

(1) 10 Ch. D. 294.
(2) 2 H. & M. 404.
(3) 18 Ves. 437.
(4) 9 Ch. D. 89.
(5) 14 Ch. D. 864.
(6) 2 Ph. 60; and note to *Lumley* v. *Wagner*, 1 D. M. & G. 627.
(7) Law Rep. 4 Ch. 654.
(8) Ibid. 17 Eq. 132.
(9) Ibid. 16 Eq. 433.

FRY, J.
1883
DONNELL
v.
BENNETT.

properly satisfied by damages, then that the Court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases. But the question which I have to determine is not whether that ought to be the way in which the line should be laid down, but whether it has been so laid down by the authorities which are binding on me.

Now several cases have been cited by the Plaintiff as authorities in favour of his contention. In the first place there is the case of *Dietrichsen* v. *Cabburn* (1), in which undoubtedly the Court enforced by way of injunction a stipulation not to sell except in a particular manner, and there the whole contract was one which could not have been performed specifically by the Court. Still more, in *Lumley* v. *Wagner* (2) the Court enforced by way of injunction a portion of a contract the whole of which could not have been enforced by way of specific performance; and Lord *St. Leonards* in considering that case discussed the question whether an injunction ought to be granted in some cases in which specific performance cannot be granted, and he determined that question plainly in the affirmative. He made these observations (3): "Wherever this Court has not proper jurisdiction to enforce specific performance it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a Judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity." It is plain, therefore, that

(1) 2 Ph. 52.
(2) 1 D. M. & G. 604.
(3) 1 D. M. & G. 619.

Lord *St. Leonards* did not adopt the view which has occurred to me as that towards which the more recent cases have been tending.

That is the way in which the direct authorities stand in cases in which there is a negative clause, and they appear to me to shew that in cases of this description where a negative clause is found, the Court has enforced it without regard to the question whether specific performance could be granted of the entire contract.

Then it is said by Mr. *Cozens-Hardy* that in all those cases the negative contract enforced was but a part of a larger contract, and that it was a separable part of that larger contract, and that those cases do not apply to a case like the present, in which, as he suggests, the negative contract is co-extensive with the positive contract.

Upon that argument two inquiries arise. In the first place, is it true to say that the negative contract is in the present instance co-extensive with the positive? In my judgment it is not. The affirmative contract is that the vendor will sell all his fish refuse for two years to the purchaser. The negative contract is that during two years he will not sell any refuse fish to any other manufacturer whomsoever; leaving it open to him so far as regards the negative contract, either not to sell at all, or to sell to some person other than a manufacturer. But in the next place one must inquire whether the authorities support any such distinction as that which has been urged by Mr. *Cozens-Hardy*. It appears to me that they do not.

In *Lumley* v. *Wagner* (1) the contract was that Mdlle. *Wagner* would sing three months at *Her Majesty's Theatre* in *London*. The negative contract was that she would not "use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. *Lumley*." It is quite true that the contract contains certain stipulations as to how many nights she should be required to sing, but it appears to me to be evident that the substantial contract, the affirmative contract, was that she would sing there for three months. Of course she could not be always singing, and therefore the con-

(1) 1 D. M. & G. 604.

FRY, J.
1883
DONNELL
v.
BENNETT.

tract must state necessarily some limits as to how often she was to sing, but when she did sing during the three months she was to sing at *Her Majesty's Theatre;* the negative terms were that during the three months she would not sing anywhere else than at *Her Majesty's Theatre.* It appears to me that those two contracts are substantially co-extensive. But further than that it is to be borne in mind that Lord *St. Leonards* does not dwell on the distinction which is now sought to be drawn, and so far as I am aware no trace of it is to be found in the earlier authorities.

But then comes the case of *Catt* v. *Tourle* (1) before the Lords Justices, in which *Hills* v. *Croll* (2) was referred to. Now *Hills* v. *Croll* was a case which contained an affirmative and negative contract, and Lord Justice *Giffard* expressly said that if that case is to be taken as laying down that the Court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply. If it is taken as going that length, it is contrary to the case of *Lumley* v. *Wagner* (3), and must be considered as overruled.

It appears to me, therefore, that that point which has been urged upon me does not receive any sanction from the earlier authorities.

I have come to the conclusion, therefore, upon the authorities, which are binding upon me, that I ought to grant this injunction. I do so with considerable difficulty, because I find it hard to draw any substantial or tangible distinction between a contract containing an express negative stipulation and a contract containing an affirmative stipulation which implies a negative. I find it exceedingly difficult to draw any rational distinction between the case of *Fothergill* v. *Rowland* (4) and the case now before me. But at the same time the Courts have laid down that, so far as the decisions have already gone in favour of granting injunctions, the injunction is to go.

It appears to me that this case is within the earlier decisions, and although I should be far from sorry if the Court of Appeal were to take a different view, I think I am bound here by the

(1) Law Rep. 4 Ch. 654.
(2) 2 Ph. 60.
(3) 1 D. M. & G. 604.
(4) Law Rep. 17 Eq. 132.

authorities, and therefore I grant the injunction till the hearing of the cause.

Solicitors for Plaintiff: *Bower, Cotton, & Bower.*
Solicitors for Defendants: *Williamson, Hill, & Co.*

C. W. C.

WILSON *v.* DE COULON.

[1874 W. 11.]

Practice—Commission to take Evidence abroad—Single Commissioner—Administration of Oath—Rules of Supreme Court, April, 1880, *Schedule, Form G.* 11.

When a single Commissioner is appointed to take evidence abroad, the commission should authorize him to administer the oath to himself.

ON the 10th of February, 1883, on the application of one of the Defendants, Mr. Justice *Fry* made an order for the appointment of a single Commissioner to take the evidence of a witness in *Paris.* The Registrar refused to draw up the order otherwise than in the common form, G. 11, in the schedule to the Rules of the Supreme Court of April, 1880 (1), which provides that any one of several Commissioners shall have power to administer an oath to the other or others of them.

A. Young, for the Defendant, now mentioned the matter to the Court, and asked that the Commission might give authority to the Commissioner to administer the oath to himself. In the form of commission adopted in *Bank of Castille* v. *Olaguivel* (2), where several Commissioners were appointed, authority was given to each Commissioner to administer the oath to the other Commissioner, "or himself to take the oath in the absence of any other Commissioner."

G. Williamson (*amicus curiæ*) mentioned, as a fact within his own knowledge, that in commissions issued by the Courts in

(1) W. N. 1880, Part II. p. 177.
(2) *Seton* on Decrees, 4th Ed. vol. ii. pt. 2, p. 1637.

FRY, J.
1883
WILSON
v.
DE COULON.

British India to take evidence in *England* it is customary to authorize a single Commissioner to administer the oath to himself.

FRY, J., directed the commission to be drawn up in the form suggested.

Solicitors: *Kearsey, Son, & Hawes.*

W. L. C.

END OF VOL. XXII.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1883, will be as follows:—

In the First Series,
22 Ch. D.

In the Second Series,
10 Q. B. D. 8 P. D.

In the Third Series,
8 App. Cas.

INDEX.

ABUSE OF BANKRUPTCY LAW - 773, 778
See BANKRUPTCY. 7, 8.

ACCOUNT—Mortgagee in possession - 478
See MORTGAGE. 1.

ACCUMULATIONS—Income—Contingent legacy—Infant - - - - 583
See INFANT.

ACT OF BANKRUPTCY — Assignment of all debtor's property - - - 788
See BANKRUPTCY. 4.

—— Departing from dwelling-house - 436
See BANKRUPTCY. 1.

ADEMPTION—Lunatic testator—Sale of stock
See WILL. 1. [622

ADJOINING TENEMENT—Right to connect 177
See EASEMENT.

ADJOURNMENT TO JUDGE - - 5
See MORTGAGE. 2.

ADJUDICATION OF BANKRUPTCY — Annulment - - - - - 436
See BANKRUPTCY. 1.

—— Liquidating debtor - - - 813
See BANKRUPTCY. 15.

ADMINISTRATION—Duty on - - 545
See SUCCESSION DUTY.

ADMINISTRATION ACTION—*Costs—Executor's Accounts.*] In an administration action no costs ought to be given out of the estate, except for those proceedings that are in their origin directed with some shew of reason and a proper foundation for the benefit of the estate, or which have in their result conduced to the benefit thereof.—A tenant for life under a will who had duly received the income of the estate, and whose solicitors had expressed themselves satisfied with the accounts rendered by the executors, instituted an action for the administration of the estate. The accounts taken shewed that the Plaintiff had been slightly overpaid:—*Held*, that the Plaintiff must have no costs of the action, and must pay the costs of the rendering of the income account. CROGGAN *v.* ALLEN - - - - 101

2. —— *Domicil—Testator domiciled in Scotland—Scotch Assets.*] A gentleman resident and domiciled in Scotland made a will in Scotch form, appointing six trustees, two of whom were resident in England, one being a Scotch member of Parliament was in England during the session, and the other three were resident in Scotland. The testator had a large property in Scotland and a comparatively trifling amount of personal estate in England. The trustees proved the will in Scotland, and then constituted themselves personal representatives in England, and removed all the English personalty to Scotland. A person resident in England, who was entitled to a share of a large legacy and also of the residue, brought an action here to administer the estate. Three of the trustees were served in England and the other three in Scotland under the usual order. They entered an appearance without protest, and took no steps to discharge the order. The Plaintiff moved for judgment for administration of the whole estate, both Scotch and English. No action was pending in Scotland in which the estate could be administered:—*Held*, by Manisty, J., that an order for administration ought not to be made:—*Held*, on appeal, that an order must be made for administration of the whole estate of the testator, for that although if the Scotch executors had appeared conditionally and applied to discharge the order for service in Scotland the Court would have entered into the question whether it was convenient to have the estate administered in England, the Court at the trial had no discretion, but was bound to give the Plaintiff a decree. *In re* ORR EWING. ORR EWING *v.* ORR EWING - - - - - C. A. 456

ADMINISTRATION ACTION—*continued.*

—— Insolvent estate—Mutual credit - 586
See BANKRUPTCY. 17.

—— Retainer by executor - - - 604
See EXECUTOR.

ADMINISTRATION OF OATH—Commission to take evidence - - - 841
See PRACTICE. 6.

ADVANCES—Trustee carrying on business 666
See TRUSTEE. 1.

ADVERSE POSSESSION—Satisfied mortgagee
See LIMITATIONS, STATUTE OF. 4. [614

AFFIDAVIT—Bill of sale - - - 136
See BILL OF SALE.

—— Production of documents—Official liquidator - - - - - 714
See COMPANY. 3.

AFTER-ACQUIRED PROPERTY—Agreement to settle - - - 263, 275
See Settlement. 1, 2.

AGENT—Misrepresentation by - - 194
See Principal and Agent.

—— Statement by—Admissibility of evidence
See Evidence. [593

AGREEMENT—Compromise—Local board 537
See Local Board.

—— For lease—Nominee of lessee—Condition precedent - - - - 441
See Landlord and Tenant. 1.

—— Tenant for life and remainderman - 128
See Settlement. 4.

ALIEN—*Nationality—Right to inherit Land in England—Descendants born Abroad of natural-born British Subject—Status of British Subject—Ambassador—Officer in Military Service of Crown abroad*—25 *Edw.* 3, *stat.* 1—7 *Anne*, *c.* 5—4 *Geo.* 2, *c.* 21, *s.* 1—13 *Geo.* 3, *c.* 21, *s.* 1.] The status of natural-born British subjects, which, by the Acts 7 Anne, c. 5, 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, is conferred on children and grandchildren born abroad of natural-born British subjects, is a merely personal status, and is not by those Acts made transmissible to the descendants of the persons to whom that status is thereby given.—There is no foundation for the notion that by the common law of England the posterity of a natural-born British subject, though born abroad, must be treated as British subjects for ever.—The rule that the children born abroad of ambassadors in the service of the Crown of England abroad, are treated as natural-born British subjects, does not apply to the children born abroad of officers in the military service of the Crown in foreign parts. De Geer *v.* Stone [C. A. 243

AMBASSADOR—Children born abroad - 243
See Alien.

AMENDMENT—Embarrassing pleading - 481
See Practice. 1.

—— Petition for adjudication of bankruptcy 529
See Bankruptcy. 5.

—— Special case - - - - 495
See Practice. 20.

ANNUITY—Gift of clear yearly sum free of all deductions—Income-tax - 182, 269
See Will. 7, 8.

ANNULMENT OF BANKRUPTCY - - 436
See Bankruptcy. 1.

APPEAL—Evidence - - - - 312
See Bankruptcy. 9.

—— Security for costs - - - 83
See Practice. 16.

—— Time for - - - - - 484
See Practice. 2.

APPOINTMENT—Power—Election - 655
See Election.

ARTICLES OF ASSOCIATION - - 349
See Company. 1.

ASSETS—Bankruptcy - - - 782
See Bankruptcy. 6.

—— Small amount of—Compounding debtor
See Bankruptcy. 7, 8. [773, 778

ASSIGNEE — Land — Covenant running with land - - - - - 218
See Covenant.

ASSIGNMENT—All debtor's property - 788
See Bankruptcy. 4.

—— For benefit of creditors - - 797
See Bankruptcy. 10.

—— Future receipts of business—Bankruptcy
See Bankruptcy. 6. [782

ASSIGNS—Mortgage for money due from mortgagor and assigns - - - 5
See Mortgage. 2.

ATTACHMENT—Service of order on solicitor
See Practice. 11. [571

ATTORNEY-GENERAL—Application for charity—Scheme - - - - 827
See Charity. 2.

ATTORNMENT—Mortgage—Bankruptcy
See Bankruptcy. 12, 13. [384, 410

—— Mortgage—Mortgagee in possession 478
See Mortgage. 1.

BANKER—Balance at—Sequestration - 233
See Practice. 17.

—— Overdrawing—Building society - 61
See Building Society.

BANKRUPTCY — *Adjudication — Application to annul—Limit of Time—Act of Bankruptcy—Departing from Dwelling-house—Onus of Proof—Annulling Adjudication—Protection of Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 10, 71—*Bankruptcy Rules*, 1870, *r.* 143.] In a proper case an adjudication of bankruptcy may be annulled upon an application made after the expiration of the time limited for appealing from it.—Sect. 10 of the Bankruptcy Act, 1869, has no application to an appeal from an adjudication, or to an application to annul it.—*Ex parte Brown* (Law Rep. 9 Ch. 304) explained.—*Ex parte Johnson* (12 Ch. D. 905) distinguished.—A petitioning creditor, who alleges that his debtor has committed an act of bankruptcy, by departing from his dwelling-house with intend to defeat and delay his creditors, is bound to shew that the debtor is alive and in some other place.—An order was made by the Court of Appeal to annul an adjudication of bankruptcy, on the ground that the debtor must be presumed to have been dead when it was made. Probate had been granted of a will executed by the debtor:—*Held*, that the costs and charges of the trustee properly incurred, and the costs of all parties of the application to annul and of the appeal, must be paid out of the estate, and that the executors must confirm all acts properly done by the trustee in the bankruptcy. *Ex parte* Geisel. *In re* Stanger - - - - C. A. 436

2. —— *Adjudication—Petitioning Creditor's Debt—"Liquidated Sum"—Defaulter on London Stock Exchange—Amount of Differences fixed by Official Assignee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6.] The amount of the differences due by a defaulter on the London Stock Exchange (as fixed by the official assignee of that body under its rules) to a Stock Exchange creditor, is a "liquidated sum" within the meaning of sect. 6

BANKRUPTCY—*continued.*

of the Bankruptcy Act, 1869, and will support a bankruptcy petition by the creditor against the defaulter. *Ex parte* WARD. *In re* WARD [C. A. 132

3. —— *Adjudication—Prior Scotch Sequestration—Jurisdiction to make Adjudication—Discretion of Court.*] Though the Court has jurisdiction to adjudge bankrupt a debtor against whom there is existing a prior unclosed Scotch sequestration in which he has not obtained a discharge, the Court has a discretion in the matter, and it will decline to make an adjudication if it does not appear that the debtor has any assets in England, or any debts contracted since the commencement of the sequestration:—*Per* JESSEL, M.R.:—Primâ facie the existence of a Scotch sequestration is a reason for declining to make an adjudication. *Ex parte* ROBINSON. *In re* ROBINSON - - - - C. A. 816

4. —— *Act of Bankruptcy—Fraudulent Conveyance — Assignment of whole of Property to secure existing Debt—Agreement by Assignee to make Further Advance—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2.] In order that a deed, assigning the whole of a debtor's property as security for an existing debt, may not be fraudulent and an act of bankruptcy within sub-sect. 2 of sect. 6 of the Bankruptcy Act, 1869, on the ground that the assignee agreed to make further advances to the assignor, it is not necessary that the agreement should be technically binding at law or in equity; a bonâ fide promise is sufficient.—The question in all such cases is whether the arrangement was made bonâ fide with the view of enabling the debtor to continue his business, or whether it was a mere scheme to obtain payment of the existing debt.—*Ex parte Dann* (17 Ch. D. 26) commented on. *Ex parte* WILKINSON. *In re* BERRY C. A. 788

5. —— *Appeal—Rehearing—Limit of Time—Refusal of Adjudication — Debtor's Summons—Judgment Debt — Statement of Consideration — Amendment of Petition—Affidavit—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 71—*Bankruptcy Rules*, 1870, *r.* 143—*Rules of Court*, 1875, *Order LVIII., r.* 15.] Though as a general rule a rehearing of a bankruptcy matter ought not to be allowed after the expiration of the time limited for appealing from the order, yet, there being no time fixed by the Act or the Rules for applying for a rehearing, the Court will on special grounds allow a rehearing when it is applied for after the expiration of the time for appealing, even when the application is to rehear a bankruptcy petition which has been dismissed.—But, *semble*, that an application for a rehearing should not be made ex parte.—When a debtor's summons is founded on a judgment debt it is not necessary to state the consideration for the judgment in the summons, and a misstatement of the consideration will not vitiate the summons.—When a bankruptcy petition is amended under an order of the Court the Judge has a discretion as to requiring the amendment to be verified by affidavit, and if the alteration is an immaterial one an affidavit will not be required. *Ex parte* RITSO. *In re* RITSO - - - C. A. 529

6. —— *Assets—Equitable Assignment of future Receipts of Business—Bankruptcy of Assignor—Relation back of Trustee's Title—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 11.] An assignment by a trader of the future receipts of his business, even if made for value, is, as regards receipts accruing after the commencement of his subsequent bankruptcy, inoperative as against the title of the trustee in the bankruptcy.—*Brice* v. *Bannister* (3 Q. B. D. 569) distinguished. *Ex parte* NICHOLS. *In re* JONES - C. A. 782

7. —— *Composition—Registration of Resolutions—Small Amount of Assets—Security—Bona fides—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 295.] *Held*, that resolutions accepting a composition of 1*s.* in the pound ought to be registered, the debtor having no assets, but the payment of the composition being secured by a third person.—The question in all such cases is whether the creditors, in accepting the composition offered, have acted bonâ fide, i.e., in the interest of the creditors, and not merely with a view to benefit the debtor.—There is no hard and fast line as to the amount of composition which may be accepted, except that the sum must not be so small that no reasonable man would accept it; for in such a case the amount would in itself be evidence of want of bona fides.—There is no absolute rule that a debtor who has no assets cannot file a liquidation petition.—*Ex parte Terrell* (4 Ch. D. 293) distinguished. *Ex parte* HUDSON. *In re* WALTON - - - - C. A. 773

8. —— *Composition—Registration of Resolutions—Small Amount of Assets—Abuse of Process of Court—Bankruptcy Act*, 1869, *s.* 126—*Bankruptcy Rules*, 1870, *r.* 295.] The creditors of a debtor whose debts amounted to £304 18*s.*, and whose assets were only £8 13*s.*, resolved to accept a composition of 3*d.* in the pound, the payment of which was to be secured by one of the creditors. The registration of the resolutions was opposed by a dissentient creditor:—*Held*, that, having regard to the small amount of the composition, the resolutions must have been passed solely in the interest of the debtor; that they were an abuse of the process of the Court; and that they ought not to be registered.—Decision of Bacon, C.J., reversed. *Ex parte* RUSSELL. *In re* ROBINS [C. A. 778

9. —— *Debtor's Summons—Security—Solvent Debtor—Bonâ fide Dispute as to Debt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7—*Right of Respondent to insist on having his Evidence heard.*] Proceedings on a debtor's summons, pending the trial of an action for the debt, will not necessarily be stayed without security, though the alleged debtor is solvent and there is a bonâ fide dispute as to the debt. The probability of success in the action is one element to be considered.—If a Judge of first instance is prepared to decide in favour of a defendant or respondent without hearing his evidence, his counsel is entitled to insist that the evidence shall be heard before the decision is given. If, however, the counsel does not exercise that right, but accepts the decision in his favour on his opponent's evidence, the Court of Appeal has still power to allow the evidence to be taken before reversing the decision.—

BANKRUPTCY—*continued.*

Ex parte Sewell (13 Ch. D. 266) explained. *Ex parte* Jacobson. *In re* Pincoffs - **C. A. 312**

10. —— *Debtor's Summons—Dismissal—Legal or equitable Defence to Action—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7—*Inchoate Agreement between Debtor and Creditors.*] In order to justify the issuing of a debtor's summons under sect. 7 of the Bankruptcy Act, 1869, the alleged debt must be an exigible debt; if the debtor would have any defence, legal or equitable, to an action for the debt the summons ought to be dismissed.—Two partners in trade whose affairs were embarrassed, without filing a liquidation petition, summoned a meeting of their creditors. Nineteen out of twenty-seven creditors attended the meeting, their debts amounting to £2400 out of a total of £2628, and a resolution was passed that a deed of assignment of the debtors' estate and effects should be made to three persons named, as trustees for the benefit of the creditors, with power for them to carry on the business for such time as they should think fit, and to sell the concern as a going concern, or otherwise. One of the debtors was to have his discharge on payment of £200, or otherwise as the creditors might direct. The resolution was signed by the chairman of the meeting, but by no one else. The day after the meeting the debtors gave up possession of their assets to the persons named in the resolution as trustees, and those persons carried on the business for a few weeks, and proceeded to collect the book debts. A draft deed of assignment was prepared in accordance with the resolution, but it was never executed, the other creditors not having assented to the arrangement embodied in the resolution:—*Held*, that, inasmuch as all the creditors did not come in and assent to the arrangement, there was no binding agreement between the debtors and their creditors, and that, consequently, a creditor who was present at the meeting, even if he had assented to the resolution, which appeared to be doubtful, was entitled to issue a debtor's summons for his debt. *Ex parte* Foster. *In re* Foster **C. A. 797**

11. —— *Disclaimer of Lease by Trustee—Rights of Lessor against Third Parties*—32 & 33 *Vict. c.* 71, *s.* 23.] The assignee of a lease became bankrupt, and his trustee disclaimed under the [illegible] section of the Bankruptcy Act, 1869. In an lessee brought by the lessor against the original accrued on the covenant in his lease, for rent ruptcy:—[illegible] the commencement of the bank- V.C.), that the affirming the decision of Hall, assignee did not disclaimer by the trustee of the of the lessor and effect the rights and liabilities lessee was still liable original lessee, and that the and West India Dock under his covenant. East Company *v.* Hill **C. A. 14**

12. —— *Disclaimer* [illegible] *Interest of Bankrupt—Lessee Trustee — Leasehold impose Terms—Mortgage—ve of Court—Power to Mortgage to Building Soci Attornment Clause—* 1869 (32 & 33 *Vict. c.* 71 *ty—Bankruptcy Act, Rules*, 1871, *r.* 28.] On a, *s.* 23—*Bankruptcy* rule 28 of the Bankruptcy giving leave, under trustee in a bankruptcy to Rules, 1871, to the interest of the bankrupt, the disclaim a leasehold Court will not order

BANKRUPTCY—*continued.*

the trustee to pay the landlord any compensation for his use and occupation of the demised property, except under special circumstances, one instance being where the trustee's occupation has been beneficial to the bankrupt's estate. Rule 28 does not mean that in every case in which leave to disclaim a lease is given, the lessor is to be placed in the same position as regards the interval before execution of the disclaimer as if there had been no disclaimer.—*Ex parte Ladbury* (17 Ch. D. 532) explained and distinguished.—Notwithstanding the insertion of an attornment clause in a mortgage deed, the real relation between the parties is that, not of landlord and tenant, but of mortgagee and mortgagor, and this fact, as well as the nature of the rent reserved by the clause, must be taken into account in considering whether, on giving leave to the trustee in the bankruptcy of the mortgagor to disclaim the tenancy created by the attornment clause, any terms should be imposed for the benefit of the mortgagee. *Ex parte* Isherwood. *In re* Knight - **C. A. 384**

13. —— *Disclaimer by Trustee — Leasehold Interest of Bankrupt—Lease determined before execution of Disclaimer — Landlord and Tenant—Distress for Rent after Bankruptcy—Breach of Covenant—Forfeiture—Entry—Action to recover Possession—Proof for Damages—Set-off—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 34, 39.] The trustee in a bankruptcy may disclaim a lease of the bankrupt even though the lease has been determined, by effluxion of time or by forfeiture, between the appointment of the trustee and the execution of the disclaimer. And in such a case the effect of the disclaimer, when executed, is that neither the lessor nor the trustee can claim the benefit of any provisions contained in the lease which were to come into operation at the expiration or sooner determination of the term.—*Semble*, that the trustee may also disclaim a lease which has been determined before his appointment.—*Ex parte Paterson* (11 Ch. D. 908) followed and approved.—A landlord, between the filing of a liquidation petition by his tenant and the appointment of trustees, levied a distress for two half-years' rent accrued due before the filing of the petition. After the appointment of trustees the landlord levied a second distress for a third half-year's rent accrued due between the filing of the petition and the appointment of the trustees:—*Held*, that the second distress was void under sect. 34 of the Bankruptcy Act, 1869.—*Held*, also, that, in respect of breaches of covenant committed by the tenant during his occupation, the only remedy of the landlord was to prove for damages in the liquidation, and that the landlord had no right of set-off as against moneys due by him to the trustee for severed crops.—When a lease contains a proviso giving the lessor a right to re-enter in the event of breach of covenant by the lessee (but not making the lease ipso facto void in that event):—*Quære*, whether under the present practice the mere commencement of an action by the lessor to recover possession of the property for breach of covenant, or the commencement of such action followed by appearance by the trustees, will, without actual entry, operate to determine the lease.—*Silcock* v.

BANKRUPTCY—*continued.*

Farmer (46 L. T. (N.S.) 404) commented upon. *Ex parte* Sir W. Hart Dyke. *In re* Morrish [C. A. 410

14. —— *Jurisdiction—Public Carrier—Lien for Freight—Agreement for General Lien—Bankruptcy—Receiver—Court of Bankruptcy.*] A trader opened with a railway company a credit account for freight, by which it was agreed that the company should have a general lien for all moneys due by him to them on any account on all goods belonging to him in their hands. He afterwards filed a liquidation petition, under which a receiver of his property and manager of his business was appointed. In order to carry on the business the receiver bought some goods, which he paid for with his own money, and sent them to the company consigned to the trader. The company claimed the benefit of the agreement, and refused to deliver the goods until they were paid the amount which the trader owed them for freight due at the time of the filing of the petition. The receiver in order to obtain the goods paid the company £50 under protest, and then applied to the Court of Bankruptcy to order the company to repay him the £50, and an order was made accordingly:—*Held*, on appeal, that the Court of Bankruptcy had no jurisdiction to make the order.—But, *semble*, that the company would have no defence to an action by the receiver for the £50.—*In re Northfield Iron and Steel Company* (14 L. T. (N.S.) 695) distinguished. *Ex parte* Great Western Railway Company. *In re* Bushell - - - - C. A. 470

15. —— *Liquidation Petition—Power to adjudicate Debtor a Bankrupt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 12.] The power given to the Court by sect. 125, sub-sect. 12 of the Bankruptcy Act, 1869, to adjudge a debtor who has filed a liquidation petition a bankrupt, may be exercised even though no liquidation or composition resolutions have been passed by the creditors. *Ex parte* Walker. *In re* McHenry [C. A. 813

16. —— *Proof in Bankruptcy—Interest—Mortgage to Building Society—Principal and Interest payable by Monthly Instalments—Bankruptcy Rules*, 1870, *r.* 77.] A mortgage to a building society provided that the loan, with a premium and interest on the advance, should be paid in equal monthly instalments during a term of twelve years, and that each monthly instalment, when paid, should be applied (1) in payment of the interest due at the time of payment, (2) in payment of the premium till the whole should be discharged, and (3) in payment of the principal. Two years after the execution of the mortgage the mortgagor filed a liquidation petition, and the society claimed to prove in the liquidation for the total amount of the monthly instalments which remained due under the deed, less the amount at which they valued their security:—*Held*, that, as to so much of the sum claimed as represented interest payable subsequently to the filing of the liquidation petition, the proof must be rejected.—Decision of *Bacon*, C.J., reversed. *Ex parte* Bath. *In re* Phillips [C. A. 450

17. —— *Undischarged Bankrupt—Close of*

BANKRUPTCY—*continued.*

Bankruptcy—Death of Bankrupt—Rights of Creditors—Set-off—Mutual Credit Clause—Administration Action—Insolvent Estate—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 39, 47, 54—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.] When a bankrupt has not obtained an order of discharge, a creditor who has proved in the bankruptcy, and who is being sued by the bankrupt, or by his executor, after his death, for a debt due to the bankrupt on a contract entered into after the commencement of the bankruptcy, cannot, during the period of three years from the close of the bankruptcy, set off the unpaid balance of his proved debt against the sum claimed in the action.—The scope of the Bankruptcy Act, 1869, is that, during the period of three years after the close of the bankruptcy, none of the creditors who could prove in the bankruptcy shall be able to obtain a preference over the others, and that after the expiration of the three years, the unpaid balances of the proved debts shall be enforced against the property of the debtor only under the direction of the Court of Bankruptcy, so that any sums which may be thus recovered may be distributed among the creditors who have proved pari passu.—The mutual credit clause (sect. 39) of the Bankruptcy Act, 1869, will not be applied in the administration of the estate of a deceased person until it is shewn that the estate is insolvent, but the Court may direct that a debt claimed on behalf of the estate from a creditor shall be paid into Court to a separate account, with liberty to the creditor to apply, in case the estate shall prove to be insolvent. *In re* Smith. Green *v.* Smith - - - - 586

BANKRUPTCY RULES, 1870, r. 77 - 450
See Bankruptcy. 16.

—— r. 143 - - - - 436, 529
See Bankruptcy. 1, 5.

—— r. 295 - - - - 773, 778
See Bankruptcy. 7, 8.

BANKRUPTCY RULES, 1871, r. 28 - 384
See Bankruptcy. 12.

BILL OF SALE—*Renewal of Registration—Affidavit—Statement of Residences of Parties—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 11—*Shorthand Notes of Evidence—Sheriff—Interpleader—Costs.*] The affidavit made on the re-registration of a bill of sale must state the residence of the grantee as it was stated in the bill of sale, even though it was there erroneously stated.—In a bill of sale the grantee was described as of "Boldock in the county of Hereford," her residence really being at Baldock in the county of Hertford. The bill of sale was registered, and was re-registered within five years. The affidavit made on the re-registration stated only the true residence of the grantee:—*Held*, that sect. 11 of the Act had not been complied with, and that the bill of sale was void as against an execution creditor of the grantor.—Costs will not be allowed of shorthand notes of evidence which are not used on the hearing of an appeal, the decision turning on a question of law.—The order on an interpleader issue between a bill of sale holder and an execution creditor gave the sheriff his costs, to be paid by the bill of sale holder. The

BILL OF SALE—*continued.*
bill of sale holder appealed, and by the notice of appeal asked that the sheriff's costs might be paid by the execution creditor. The notice was served on the sheriff, and he appeared by counsel on the hearing of the appeal. His counsel took no part in the argument of the appeal, but only asked for costs. It was not suggested that the execution creditor was not as well able to pay the sheriff's costs as the bill of sale holder:—*Held*, that, though it was an error to serve the sheriff with a formal notice of the appeal, he ought not to have appeared on the hearing, and that he was not entitled to any costs of the appeal. *Ex parte* Webster. *In re* Morris - - **C. A. 136**

BONA FIDES—Resolution for composition
See Bankruptcy. 7, 8. [**773, 778**

BOND—Statute of Limitations—Mortgagee **579**
See Limitations, Statute of. 2.

BORROWING POWERS—Building society **61**
See Building Society.

BRITISH SUBJECT — Status of — Descendants born abroad - - - - **243**
See Alien.

BROKER—Employment of—Loss of trust fund
See Trustee. 3. [**727**

BUILDING SOCIETY—*Borrowing Powers—Overdrawing Banker's Account—Deposit of Deeds—Rule in Clayton's Case.*] A benefit building society which had no power to borrow money, were permitted by their bankers to overdraw their account to a large amount; and in 1876 a memorandum of agreement was signed by the officers of the society and confirmed by the directors stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe custody but as a security for the balance from time to time due. In 1881 an order for winding up the society was made, and the bankers claimed to retain the deeds as security for the balance of their account. No evidence was given as to the application of the money which was advanced by the bankers; but the solicitors on both sides signed an admission that some part was applied in payment of members withdrawing from the society and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property:—*Held*, that the overdrawing of the bankers' account was ultrà vires, being a borrowing unauthorized either by the rules or the objects of the society, and therefore that the bankers had no lien on the deeds either under the agreement or by the course of dealing with the society; but that they were entitled to hold the deeds as a security for such part of the money advanced by them as had been applied in payment of the debts and liabilities of the society properly payable and had not been repaid to the bankers; but that in ascertaining what had been so applied the bankers could not rely on the rule in *Clayton's Case* (1 Mer. 572).—*Held*, also, that the admission by the solicitors of the society that some part of the money had been applied in payment of lawful expenses was sufficient to entitle the bankers to a declaration and an inquiry as to the amount so applied.—*In re Cork and Youghal Railway Company* (Law Rep. 4 Ch. 748) followed. Blackburn Building Society *v.* Cunliffe, Brooks, & Co. - **C. A. 61**

BUILDING SOCIETY—*continued.*
—— Mortgage to—Bankruptcy—Disclaimer **384**
See Bankruptcy. 12.

—— Mortgage to—Bankruptcy—Proof - **450**
See Bankruptcy. 16.

CAPITAL—Application of—Company - **349**
See Company. 1.

CARRIER—Lien for freight—Bankruptcy **470**
See Bankruptcy. 14.

CASES—*Aird's Estate, In re* (12 Ch. D. 291), not followed - - - - **495**
See Will. 9.

—— *Barrow* v. *Barrow* (4 K. & J. 409) followed
See Settlement. 1. [**263**

—— *Bartlett* v. *Rees* (Law Rep. 12 Eq. 395) followed - - - - **549**
See Mortgage. 3.

—— *Blyth and Young, In re* (13 Ch. D. 416), considered - - - - **484**
See Practice. 2.

—— *Bostock* v. *Floyer* (Law Rep. 1 Eq. 26) explained - - - - **727**
See Trustee. 3.

—— *Boyd's Settled Estates, In re* (21 W. R. 667), overruled - - - - **93**
See Practice. 10.

—— *Brice* v. *Bannister* (3 Q. B. D. 569) distinguished - - - - **782**
See Bankruptcy. 6.

—— *Brown, Ex parte* (Law Rep. 9 Ch. 304), explained - - - - **436**
See Bankruptcy. 1.

—— *Carter* v. *Wake* (4 Ch. D. 605) distinguished
See Mortgage. 3. [**549**

—— *Clayton's Case* (1 Mer. 572) considered **61**
See Building Society.

—— *Cork and Youghal Railway Company* (Law Rep. 4 Ch. 748) followed - - - **61**
See Building Society.

—— *Cox* v. *Mitchell* (7 C. B. (N.S.) 55) considered
See Practice. 22. [**397**

—— *Dann, Ex parte* (17 Ch. D. 26), commented on - - - - - **788**
See Bankruptcy. 4.

—— *Dillon (Lord)* v. *Alvares* (4 Ves. 357) not followed - - - - **397**
See Practice. 22.

—— *Frodsham* v. *Frodsham* (15 Ch. D. 317) distinguished - - - - **635**
See Trustee Relief Act.

—— *Green* v. *Britten* (42 L. J. (Ch.) 187) followed - - - - **573**
See Will. 5.

—— *Hoare* v. *Osborne* (12 W. R. 661; 33 L. J. (Ch.) 586) disapproved - - **238**
See Power.

—— *Hopgood* v. *Parkin* (Law Rep. 11 Eq. 74) questioned - - - - **727**
See Trustee. 3.

—— *Johnson, Ex parte* (12 Ch. D. 905), distinguished - - - - **436**
See Bankruptcy. 1.

CASES—*continued.*

—— *Jones* v. *Green* (Law Rep. 5 Eq. 555) considered - - - - 622
See WILL. 1.

—— *Jones* v. *Lloyd* (Law Rep. 18 Eq. 265) followed
See SETTLEMENT. 1. [263

—— *Ladbury, Ex parte* (17 Ch. D. 532), explained and distinguished - - - 384
See BANKRUPTCY. 12.

—— *Leeming, In re* (3 D. F. & J. 43), considered
See WILL. 1. [622

—— *Little's Case* (8 Ch. D. 806) considered and distinguished - - - 484
See PRACTICE. 2.

—— *McAndrew* v. *Barker* (7 Ch. D. 701) considered - - - - 484
See PRACTICE. 2.

—— *Mainwaring's Settlement, In re* (Law Rep. 2 Eq. 487), not followed - - 275
See SETTLEMENT. 2.

—— *Metropolitan Board of Works* v. *London and North Western Railway Company* (17 Ch. D. 246) considered - - 221
See NUISANCE.

—— *Meux's Executors' Case* (2 D. M. & G. 522) distinguished - - - - 593
See EVIDENCE.

—— *Mundy* v. *Howe (Earl)* (4 Bro. C. C. 224) commented on - - - 521
See SETTLEMENT. 3.

—— *Northfield Iron and Steel Company, In re* (14 L. T. (N.S.) 695), distinguished 470
See BANKRUPTCY. 14.

—— *Paterson, Ex parte* (11 Ch. D. 908), followed and approved - - - 410
See BANKRUPTCY. 13.

—— *Price* v. *Jenkins* (5 Ch. D. 619) distinguished.
See FRAUDULENT CONVEYANCE. [74

—— *Ranelaugh (Lord)* v. *Hayes* (1 Vern. 189) not followed - - - - 561
See TRUSTEE. 2.

—— *Ransome* v. *Burgess* (Law Rep. 3 Eq. 773) disapproved - - - - 521
See SETTLEMENT. 3.

—— *Rishton* v. *Cobb* (5 My. & Cr. 145) considered
See WILL. 10. [597

—— *Sargent, Ex parte* (Law Rep. 17 Eq. 273), distinguished - - - 830
See COMPANY. 2.

—— *Sewell, Ex parte* (13 Ch. D. 266), explained
See BANKRUPTCY. 9. [312

—— *Silcock* v. *Farmer* (46 L. T. (N.S.) 404) commented upon - - - 410
See BANKRUPTCY. 13.

—— *Smith* v. *Lucas* (18 Ch. D. 531) followed 263
See SETTLEMENT. 1.

—— *Sutton* v. *Sutton* (22 Ch. D. 511) followed
See LIMITATIONS, STATUTE OF. 2. [579

—— *Talbot* v. *Marshfield* (2 Dr. & Sm. 549) followed - - - - 609
See PRACTICE. 12.

—— *Terrell, Ex parte* (4 Ch. D. 293), distinguished - - - - 773
See BANKRUPTCY. 7.

CASES—*continued.*

—— *Venour's Settled Estates, In re* (2 Ch. D. 522), corrected - - - - 511
See LIMITATIONS, STATUTE OF. 1.

—— *Walker* v. *Mottram* (19 Ch. D. 355) followed
See PARTNERSHIP. [504

—— *Wickens* v. *Townshend* (1 Russ. & My. 361) applied - - - - 604
See EXECUTOR.

—— *Wolverhampton and Wallsall Railway Company* v. *London and North Western Railway Company* (Law Rep. 16 Eq. 433) considered - - - - 835
See SPECIFIC PERFORMANCE.

—— *Woolridge* v. *Woolridge* (Joh. 63) distinguished - - - - 555
See ELECTION.

CHAIRMAN OF COMPANY—Statement by—Agent - - - - 593
See EVIDENCE.

CHAMBERS—Adjournment to Judge—Costs 5
See MORTGAGE. 2.

—— Evidence in - - - - 430
See PRACTICE. 5.

—— Proceedings in - - - - 635
See TRUSTEE RELIEF ACT.

CHARGES—Advances by trustee—Carrying on business - - - - 666
See TRUSTEE. 1.

CHARITY — *Mortmain — Improvement Bond — Mortgage of Rates—Pure Personalty*—9 *Geo.* 2, *c.* 36.] By an Act passed for the improvement of a suburban estate, commissioners were empowered to make rates upon the occupiers of houses, lands, tenements, and hereditaments, within the limits of the Act, and to borrow at interest on the credit of the rates, and to assign over the rates or any part thereof as a security for repayment of the sums borrowed. If any person rated did not pay, power was given to the Commissioners to recover the rate by action of debt, or by distress and sale of the goods and chattels of such person.—By the Metropolis Local Management Act, 1855, the powers of the Commissioners in this and other like cases were vested in the vestries of the parishes, with power to require the overseers to levy and pay over sums required for the expenses of the execution of the Act: and the overseers for the purpose of levying such rates were to proceed in the same manner and with the same powers as for levying money for the relief of the poor. In case of non-payment of any rate, any justice might on complaint by the vestry issue a warrant for levying the amount by distress and sale of the goods of the overseers; but the vestries of certain parishes, including the parish in which this estate was situated, were themselves to levy the rates directly on the occupiers instead of on the overseers. In case of non-payment of principal or interest due on any mortgage under the Act, the mortgagee could obtain a receiver:—*Held*, that an assignment by way of mortgage of a proportion of the rates arising under the Improvement Act, to secure the repayment of a sum advanced by the assignee, did not create an interest in land within the meaning of the Mortmain Act. JERVIS *v.* LAWRENCE - - 202

CHARITY—*continued.*

2. —— *Scheme — Attorney-General—Application to Scotch Court.*] An English testator bequeathed the residue of his estate to his executors, and to trustees to be appointed by them, on trust for the benefit of the blind in Inverness-shire. The surviving executor declined to act in the trust, or even to appoint new trustees:—*Held*, that the Attorney-General, and not the surviving executor, was the person to whom liberty ought to be given to apply to the Court of Session in Scotland for the settlement of a scheme for the charity. *In re* Fraser. Yeates *v.* Fraser 827

CHATTELS—Contract not to sell - - 835
See Specific Performance.

CHILDREN—Gift to children of A. and B.—To be vested at testator's death - 111
See Will. 2.

CHOSE IN ACTION—Sequestration - 233
See Practice. 17.

CLASS—Children of A. and B.—To be vested at testator's death - - - 111
See Will. 2.

CLOSE OF BANKRUPTCY - - - 586
See Bankruptcy. 17.

COMMISSION—Mortgage payable by instalments
See Mortgage. 3. [549

—— To take evidence abroad - - 841
See Practice. 6.

COMPANY—*Memorandum of Association—Articles inconsistent with Memorandum — Application of Capital.*] By the memorandum of association of a company limited by shares it was stated that the objects of the company were, the cultivation of lands in Ireland, and other similar purposes there specified, and to do all such other things as the company might deem incidental or conducive to the attainment of any of those objects, and that the capital of the company was £1,050,000, divided into 140,000 A shares of £5 each, and 3500 B shares of £100 each. By the 8th of the contemporaneous articles of association it was provided that the capital produced by the issue of B shares should be invested, and that the income, and so far as necessary the capital, should be applied so as to make good to the holders of A shares a preferential dividend of £5 per cent. on the amounts paid up on the A shares. Subject to this, the B fund was to belong to the owners of B shares. The profits of the company, after paying the £5 per cent. dividend to the A shareholders, were to be applied in payment of a non-cumulative dividend of £5 per cent. to the B shareholders, and the surplus was to be divided rateably between the A shareholders and B shareholders according to the amounts paid up on their respective shares:—*Held*, by Chitty, J., and by the Court of Appeal, that article 8 was invalid, as it purported to made the B capital applicable to purposes not within the objects of the company as defined by the memorandum of association, and in a way not incidental or conducive to the attainment of those objects, and that the directors must be restrained from acting upon it.—The articles of association of a company cannot, except in the cases provided for by sect. 12 of the Companies Act, 1862, modify the memorandum of association

COMPANY—*continued.*

in any of the particulars required by the Act to be stated in the memorandum. Guinness *v.* Land Corporation of Ireland - - C. A. 349

2. —— *Shares — Pledge — Blank Transfer — Power of Pledgee.*] The registered holder of shares in a company, whose articles of association did not require that a transfer of shares should be made by deed, deposited the certificates of his shares, accompanied by a transfer executed by himself, but with the name of the transferee and the date of execution left in blank, with a person who advanced him money, as security for the loan. No time was fixed for the repayment of the loan, and nothing was said as to the object of the transfer:—*Held*, that the depositee had no authority, without a previous demand for repayment of the loan, to sell or sub-mortgage the shares and fill in the name of the purchaser or sub-mortgagee as transferee.—*Ex parte Sargent* (Law Rep. 17 Eq. 273) distinguished.—The rules as to the power of sale possessed by the pledgee of a chattel apply also to the pledgee of a chose in action. France *v.* Clark - - - 830

3. —— *Winding-up — Practice — Companies Act*, 1862, *s.* 165—*Affidavit embracing distinct Cases against different Parties—Affidavit of Documents by Official Liquidator.*] The official liquidator of a company applied, under sect. 165 of the Companies Act, 1862, to make a number of gentlemen, some of whom were and others had been directors, responsible for acts of misfeasance. The alleged acts were 107 in number. E. had been a director only during the period in which the first eleven of these acts were done, and it was not sought to make him liable in respect of any others. The liquidator filed an affidavit of 1150 folios, including all the cases. E., who appeared alone, applied for an order that the liquidator might state what paragraphs he intended to read against E. It appeared that E.'s solicitor had borrowed the affidavit and was, on his own shewing, able to make out what parts of the affidavit affected E.:—*Held*, affirming the decision of Chitty, J., that E.'s application must be refused, for that although the Court would interfere if the cases against different parties were mixed up together in a way which was oppressive, a Defendant must, as a general rule, ascertain for himself what part of the Plaintiff's evidence affects him, and that there were no circumstances in the present case to take it out of the general rule.—E. applied that the official liquidator might be ordered to make the usual affidavit as to documents in his possession:—*Held*, affirming the decision of Chitty, J., that such an order ought not to be made, for that the official liquidator, being an officer of the Court, is not, even in proceedings under sect. 165, in the position of an ordinary litigant, and will not, in the absence of special circumstances, be required to make an affidavit as to documents in his possession, though he is bound to produce to the adverse litigant the documents which the latter requires to see. *In re* Mutual Society - - - C. A. 714

4. —— *Winding-up—Set-off—Claims against Company assigned to Director and again assigned by him — Notice — Misfeasance of Director — Damages—Companies Act*, 1862 (25 & 26 *Vict.*

COMPANY—*continued.*

c. 89), *s.* 165—*Judicature Act*, 1873, *s.* 25, *sub-s.* 6.] A company was in 1877 ordered to be wound up. H., who was an original director, and had received eighty-five shares from the promoter, in 1879 obtained from creditors of the company assignments of their claims, and on the 25th of February, 1880, assigned them all for value to T., who gave notice to the liquidator the day following, and was not at the time aware that the company had any claim against H. On the 28th of July, 1880, on a summons, dated the 5th of February, 1880, taken out by the liquidator under the 165th section of the Companies Act, 1862 (25 & 26 Vict. c. 89) against H. for damages, for a misfeasance in respect of the eighty-five shares, an order was made for payment by him of the sum of £2000. In 1881 the dividends on these claims against the company were ordered to be paid into Court. On a summons taken out by T. for payment out to him:—*Held*, that the sum of £2000 was damages and not a debt, and that it was not subject to any equity on the part of the liquidator to a set-off against the dividends, but that T. was entitled to them. *In re* MILAN TRAMWAYS COMPANY. *Ex parte* THEYS - - - - - - 122

COMPOSITION - - - 773, 778
See BANKRUPTCY. 7, 8.

COMPROMISE—Local board - - 537
See LOCAL BOARD.

COMPULSORY POWERS—Railway company 25,
See LANDS CLAUSES ACT. 1, 2. [142

COMPULSORY PURCHASE—Lands Clauses Act
See LANDS CLAUSES ACT. 2. [142

CONDITION—Precedent—Agreement for lease—Nominee of lessee - - - 441
See LANDLORD AND TENANT. 1.

—— Precedent—Compulsory purchase - 142
See LANDS CLAUSES ACT. 2.

—— Precedent—Covenant to renew lease—Notice of option - - - - 640
See RENEWABLE LEASE.

CONFIRMATION OF SETTLEMENT—Infant 263
See SETTLEMENT. 1.

CONSIDERATION — Statement of — Judgment debt - - - - - 529
See BANKRUPTCY. 5.

CONS. ORD. XXXV., r. 1. - - - 635
See TRUSTEE RELIEF ACT.

CONTINGENT LEGACY—Infant — Maintenance —Accumulations - - - 583
See INFANT.

CONTRACT—Revocation - - - 105
See VENDOR AND PURCHASER.

—— Under seal—Local board - - 537
See LOCAL BOARD.

CONTROL OF COURT—Money in—Investment 93
See PRACTICE. 10.

CONVEYANCE—Fraudulent—13 Eliz. c. 5 74
See FRAUDULENT CONVEYANCE.

CORRESPONDENCE—Ante litem motam - 609
See PRACTICE. 12.

COSTS—Administration action - - 101
See ADMINISTRATION ACTION. 2.

COSTS—*continued.*

—— Discretion of Court - - - 611
See PRACTICE. 9.

—— Higher and lower scale - - 473
See PRACTICE. 3.

—— Mortgage - - - - 5
See MORTGAGE. 2.

—— Mortgage—Second mortgagee - 566
See MORTGAGE. 5.

—— Respondent to appeal - - - 484
See PRACTICE. 2.

—— Security for—Appeal - - - 83
See PRACTICE. 16.

—— Sheriff - - - - - 136
See BILL OF SALE.

—— Shorthand notes - - - 136
See BILL OF SALE.

COVENANT — *Restrictive* — *Running with the Land.*] Land was granted in fee in consideration of a rent-charge, and the deed of grant contained a covenant to build houses on the land the rent of which should be double the value of the rent reserved by the deed, without limiting any time within which such building was to be required.—*Held*, that such covenant was unusually restrictive.—*Semble*, that although the assignee of the grantee of the land was not liable affirmatively on such covenant, he might be called on to allow the house to be built in accordance with the covenant. ANDREW *v.* AITKIN - - 218

—— Breach—Proof in bankruptcy - 410
See BANKRUPTCY. 13.

—— Statute of Limitations—Mortgage - 511
See LIMITATIONS, STATUTE OF. 1.

—— To renew lease - - - - 640
See RENEWABLE LEASE.

CREDITORS—Intent to defraud - - 74
See FRAUDULENT CONVEYANCE.

CROPS—Valuation of - - - 769
See LANDLORD AND TENANT. 2.

CUSTOMERS—Solicitation of - - 504
See PARTNERSHIP.

DAMAGES—Breach of covenant—Proof in bankruptcy - - - - 410
See BANKRUPTCY. 13.

—— Set-off—Misconduct of director - 122
See COMPANY. 4.

DEATH—Before testator - - - 111
See WILL. 2.

—— Before testator—Child, leaving issue 663
See WILL. 4.

—— Legatee—Gift over - - - 236
See WILL. 3.

DEBT—Bequest of "estate and effects" - 573
See WILL. 5.

—— Dispute as to—Debtor's summons - 312
See BANKRUPTCY. 9.

DEBTOR'S SUMMONS - - 312, 797
See BANKRUPTCY. 9, 10.

—— Judgment debt - - - - 529
See BANKRUPTCY. 5.

DEEDS—Delivery of—Foreclosure - 566
See MORTGAGE. 5.

DEFEATING AND DELAYING CREDITORS 74
See Fraudulent Conveyance.
DELAY—Motion for security for costs - 83
See Practice. 16.
DEPARTING FROM DWELLING-HOUSE 436
See Bankruptcy. 1.
DEPRIVATION—Sentence of—Jurisdiction 316
See Ecclesiastical Law.
DEVASTAVIT—Claim against executor—Statute of Limitations - - - 820
See Limitations, Statute of. 3.
DIFFERENCES—Stock Exchange - - 132
See Bankruptcy. 2.
DIRECTOR—Statement by—Agent - 593
See Evidence.
DISCLAIMER—Bankruptcy - 14, 384, 410
See Bankruptcy. 11, 12, 13.
—— Onerous legacy - - - - 573
See Will. 5.
—— Second mortgagee—Costs - - 566
See Mortgage. 5.
DISCOVERY—Order for—Attachment - 571
See Practice. 11.
DISCRETION — Court — Adjudication of bankruptcy—Scotch sequestration - 816
See Bankruptcy. 3.
—— Court—Costs - - - - 611
See Practice. 9.
DISSOLUTION OF PARTNERSHIP—Solicitation of old customers - - - 504
See Partnership.
DISTRESS—Bankruptcy - - - 410
See Bankruptcy. 13.
DISTURBANCE OF MARKET - - 287
See Market.
DIVORCED HUSBAND—Legacy to husband 619
See Will. 6.
DIVORCED WIFE—Annuity during widowhood
See Will. 10. [597
DOCUMENTS—Production of - - 609
See Practice. 12
DOMICIL—Scotch—Action for administration in England - - - - 456
See Administration Action. 1.
DRAINAGE—Nuisance by Local Board - 221
See Nuisance.

EASEMENT — *Right to use Fascia—Adjoining Tenement—Common Landlord.*] The Plaintiff was lessee of a house numbered 152 in A. Street, but which lay behind Nos. 151 and 153 in that street, and at the bottom of a court approached by a passage from A. Street, half of which passage was under the first floor of No. 151, and the other half under the first floor of No. 153. The passage was closed by a gate in the plane of the front of 151 and 153, which was hung on the wall of 153, but was admitted to be part of the Plaintiff's premises. All three houses belonged to the same landlord. Above the gate was a fascia of cement eight feet long, half of which was on the wall of 151, and the other half on that of 153. The fascia had existed from about 1845, and the number of the Plaintiff's house and the name and business of the occupier for the time

EASEMENT—*continued.*

being had always been painted on it. No. 153 was demised to the Defendant in 1874 without any express reservation of the fascia, and the Plaintiff became lessee of No. 152 in 1876:—*Held* (affirming the decision of Kay, J.), that the fascia must be held to be a parcel of the property demised to the Plaintiff, and that he was entitled to prevent the Defendant from interfering with it. Francis *v.* Hayward - - - **C. A. 177**

—— Railway—Right to cross lands of another company - - - - 677
See Lands Clauses Act. 3.

ECCLESIASTICAL LAW—*Sentence of Deprivation—Jurisdiction — Prohibition—House of Lords—Palace of Westminster—Royal Peculiar—Royal Palace—Royal Residence—Church Discipline Act*, 1840 (3 & 4 *Vict. c.* 86).] A suit having been brought against a clerk in the Court of Arches, under the Church Discipline Act, a sentence of suspension for six months was pronounced against him on the 9th of March, 1878, but was made conditional on an affidavit being filed. Afterwards the affidavit was filed, and an unconditional sentence was pronounced on the 23rd of March and served on the Defendant.—A fresh suit was instituted in 1880 for fresh offences, and also for contumacious disobedience to the sentence of the 23rd of March, 1878. These offences being proved, the Defendant was sentenced to be deprived of his benefice. This sentence was pronounced by the Dean of Arches in Committee Room E of the House of Lords.—A motion for a prohibition having been brought to restrain the Court of Arches from enforcing the sentence:—*Held*, first, that the sentence of the 9th of March was an interlocutory order which did not end the suit, and therefore the Court was not functus officio when it pronounced the unconditional sentence of suspension:—Secondly. That even if the unconditional sentence had been void, the Court would not have exceeded its jurisdiction in passing the sentence of deprivation, as there were other offences proved which would have supported it:—Thirdly. That the site of the old Palace of Westminster is no longer a peculiar, but is within the diocese of London and the jurisdiction of the Court of Arches:—Fourthly. That the new Palace of Westminster is not exempt from the jurisdiction of the ordinary Civil and Ecclesiastical Courts on the ground of privilege, inasmuch as it has ceased to be a royal residence:—Whether Committee Room E of the House of Lords is within the precincts of the old Palace of Westminster, *quære*. Combe *v.* De la Bere [**C. A. 316**

ELECTION—*Power—Appointment.*] A testator, having power under a settlement to appoint the settled hereditaments to children of his first marriage only, appointed the settled hereditaments (describing them as his own property) in favour of a son of the first marriage subject to a charge in favour of his other children, including the children of his second marriage, and he devised property of his own to the same son subject to the same charges in favour of his other children "so as to equalize the shares of all his children in all his property":—*Held*, that a case of election arose in favour of the children of the second

ELECTION—*continued.*
marriage.—*Woolridge* v. *Woolridge* (Joh. 63) distinguished. White *v.* White - - 555
—— Lunatic—Confirmation of settlement by married woman—Election by Court 263
See Settlement. 1.
—— Remedy—Concurrent actions - - 397
See Practice. 22.

EMBARRASSING PLEADING - - 481
See Practice. 1.

ENTRY ON LAND—Railway company - 25
See Lands Clauses Act. 1.

EQUITABLE MORTGAGE—Foreclosure—Form of order - - - - 283
See Mortgage. 4.

EVIDENCE—*Admissibility—Statement by Agent—Company—Director—Rectification of Register.*] A shareholder in a company applied to have his name removed from the register of members on the ground that he had been induced to become a shareholder by a material mis-representation in a prospectus issued by the company. The only evidence of the untruth of the representation was a statement made by the chairman of the company in a speech addressed by him to a meeting of the shareholders:—*Held*, that this statement was not admissible evidence against the company, inasmuch as the chairman in making it was not acting as the agent of the company in a transaction between them and a third party, but was making a confidential report to his own principal.—*Meux's Executors' Case* (2 D. M. & G. 522) distinguished. *In re* Devala Provident Gold Mining Company - - - - 593
—— Commission to take - - - 841
See Practice. 6.
—— Right of Respondent to have evidence heard - - - - 312
See Bankruptcy. 9.
—— Right to subpœna witness - - 430
See Practice. 5.

EXECUTOR—*Retainer—Administration Action—Appointment of Receiver—Solicitor—Conflict of Interest and Duty.*] In a creditor's administration action, brought against the administrator of an intestate (the Defendant being a solicitor, and a member of the firm of solicitors who were acting for the Plaintiff), after judgment for administration had been pronounced, an order was made on the application of the Plaintiff by his solicitors for the appointment of a specified person, "upon his giving security," to receive the rents of the intestate's real estate, and to collect and get in his outstanding personal estate. On the application for this order the Defendant made an affidavit stating his approval of the person proposed. Before the receiver had perfected his security some money arising from the sale of furniture belonging to the intestate was received by the Defendant's firm, and appropriated by him, and he claimed to retain out of it a debt due to him by the intestate:—*Held*, that, by reason of the relation in which the Defendant stood to the Plaintiff as a member of the firm of solicitors who were acting for him, the Defendant stood in no better position than he would have stood after the receiver had perfected his security, and that

EXECUTOR—*continued.*
the Defendant could not under the circumstances exercise his right of retainer.—*Wickens* v. *Townshend* (1 Russ. & My. 361) applied. *In re* Birt. Birt *v.* Burt - - - - - 604
—— Devastavit—Statute of Limitations - 820
See Limitations, Statute of. 3.
—— Scotch will—Action for administration in England - - - - 456
See Administration Action. 1.

EXPRESS TRUST—Statute of Limitations—Satisfied mortgagee - - 614
See Limitations, Statute of. 4.

EXPULSION OF PARTNER—Soliciting customers - - - - 504
See Partnership.

EXTENSION OF TIME—Appeal - - 484
See Practice. 2.

FASCIA—Right to use - - - 177
See Easement.

FATHER—Right to receive income for maintenance of child - - - 521
See Settlement. 3.

FORECLOSURE—Action for—Writ of possession
See Practice. 8. [281
—— Defendant not appearing—Order for sale
See Practice. 7. [235
—— Equitable mortgage—Form of order 283
See Mortgage. 4.
—— Payment by instalments - - 549
See Mortgage. 3.
—— Second mortgagee—Delivery of deeds 566
See Mortgage. 5.

FOREIGN ACTION—Election - - 397
See Practice. 22.

FRANCHISE—Market—Extinguishment by statute - - - - 287
See Market.

FRAUDS, STATUTE OF—Agreement by letters
See Landlord and Tenant. 1. [441

FRAUDULENT CONVEYANCE—*Intent to defeat or delay Creditors*—13 *Eliz. c.* 5.] In 1872 R. R. gave to the W. Bank a guarantee to secure the balance due from his son R. H. R. on his banking account to the extent of £1000. On the 25th of May, 1877, R. H. R.'s account was overdrawn by £1515. On that day R. R. made a voluntary settlement of a leasehold property worth £200 a-year, which he held at a rent of £3 10*s.* His only other property was furniture worth less than £200, and a debt of £1500 due to him from R. H. R. In 1880 R. H. R., whose account was then overdrawn by £1313, went into liquidation and paid a dividend of 3*s.* in the pound. There was some general evidence that R. H. R. was solvent at the date of the settlement. R. R having died, the Bank took proceedings to set aside the settlement and to have the leasehold treated as assets of R. R. in a suit for administration of his estate in which the Bank had been admitted creditors for £1000 on the guarantee:—*Held* by Vice-Chancellor Bacon, that the settlement was valid against creditors, as there was no evidence

FRAUDULENT CONVEYANCE—*continued.*
that it was made with intent to defeat or delay creditors.—*Held*, by the Court of Appeal, that the settlement was not a settlement for value within the meaning of 13 Eliz. c. 5, the doctrine of *Price* v. *Jenkins* (5 Ch. D. 619) not being applicable to cases under that statute. — But *held*, reversing the decision below, that the settlement was invalid as against creditors, for that under the circumstances the liability under the guarantee ought to have been regarded as a substantial one; that R. R. had no right to treat the £1500 due from R. H. R. as a good debt; that the settlement must therefore be looked upon as a settlement of all his property, leaving him nothing out of which he could meet his liability under the guarantee, and that an intention to defeat or delay creditors must be inferred. *In re* Ridler. Ridler *v.* Ridler - - - - - C. A. 74
—— Act of bankruptcy - - - 788
See Bankruptcy. 4.

GENERAL ORDER, FEB. 1, 1861 - - 93
See Practice. 10.

HIGHER OR LOWER SCALE—Costs - 473
See Practice. 3.
HUSBAND AND WIFE—Appointment by wife—Will - - - - - 238
See Power.
—— Divorced husband—Legacy - - 619
See Will. 6.
—— Settlement.
See Cases under Settlement.

IMPROVEMENT BOND—Mortmain - 202
See Charity. 1.
INCOME—Accumulations—Infant—Maintenance
See Infant. [583
—— Contingent legacy - - - 573
See Will. 5.
INCOME TAX—Gift of annuity free of all deductions - - - 182, 269
See Will. 7, 8.
INCOMING TENANT - - - 769
See Landlord and Tenant. 2.
INDEMNITY—Trustee—Future liability 561
See Trustee. 2.
INDIA STOCK—Investment of money in Court
See Practice. 10. [93
INFANT—*Maintenance—Accumulations — Defeasible Estate—Lord Cranworth's Act* (23 & 24 *Vict.* c. 145), *s.* 26.] Property was bequeathed to trustees in trust for an infant, with a gift over in case of his death under twenty-one.—The trustees accumulated the income of the property not required for his maintenance, in pursuance of the powers given by sect. 26 of Lord Cranworth's Act.—The infant died under twenty-one.—*Held*, that the accumulations of income to the time of the death of the infant belonged to the infant, and were not to be held for the benefit of the remainderman who ultimately became entitled to the property from which the accumulations arose. *In re* Buckley's Trusts - - - - 583

INFANT—*continued.*
—— Maintenance—Right of father to income
See Settlement. 3. [521
—— Settlement by—Confirmation—Lunatic 263
See Settlement. 1.
INFORMAL APPEAL - - - 484
See Practice. 2.
INJUNCTION—Contract not to sell - 835
See Specific Performance.
—— Nuisance by local board - - 221
See Nuisance.
—— Partner—Soliciting customers - 504
See Partnership.
INSTALMENTS—Mortgage to building society—Proof in bankruptcy - - 450
See Bankruptcy. 16.
INTENT TO DELAY CREDITORS - - 74
See Fraudulent Conveyance.
INTERPLEADER—Costs of sheriff - 136
See Bill of Sale.
INTERROGATORIES—Patent action - 629
See Patent.
INVALID MARRIAGE—Legacy to widow 597
See Will. 10.
INVESTMENT — Sanctioned by Court—Lands Clauses Act - - - - 93
See Practice. 10.
ISSUE OF FACT—Staying proceedings on 88
See Practice. 21.

JUDGMENT—Mortgage debt—Merger - 98
See Mortgage. 6.
JURISDICTION—Appellant out of - - 83
See Practice. 16.
—— Bankruptcy—Carrier's lien - - 470
See Bankruptcy. 14.
—— Bankruptcy—Scotch sequestration - 816
See Bankruptcy. 3.
—— Ecclesiastical law—Palace of Westminster
See Ecclesiastical Law. [316
—— Service out of jurisdiction - - 86
See Practice. 18.

LANDLORD AND TENANT—*Agreement—Specific Performance—Condition Precedent—Agreement to grant Lease to Nominee of Plaintiff—No Nominee appointed — Agreement by Letter — Statute of Frauds.*] A lessee wrote to his lessor offering to surrender his lease and to take a fresh lease for twenty-one years to a nominee, or to a company which he intended to form, at an increased rent, but otherwise on the same terms as the existing lease; and by a subsequent letter offered to instruct his solicitor to prepare a draft lease. The lessor telegraphed to him in reply to get the lease prepared. Afterwards correspondence took place between the solicitors as to the form of the lease, and the lessee's solicitor prepared a formal agreement. Differences having arisen, the lessor refused to grant the lease, and the lessee brought an action for specific performance of the agreement to grant a lease and for damages. No company had been formed and no nominee appointed by the Plaintiff before the trial of the action:—

LANDLORD AND TENANT—*continued.*

Held (reversing the decision of Kay, J.), that assuming that there was a binding agreement for a lease, the formation of a company or appointment of a nominee was a condition precedent, and that the Plaintiff could not maintain an action for specific performance of the contract, as he had not performed the condition.—But, *held*, also, on the construction of the correspondence, that there was no binding agreement between the parties, and therefore the action entirely failed. Williams *v.* Brisco - - - - C. A. 441

3. —— *Incoming and outgoing Tenant—Valuation of Tenant's Crops, &c.*] An owner in fee demised a farm for seven years, and agreed at the expiration of the term to pay for the tenant's property in and upon the farm at a valuation. He devised the land to trustees for a term of 1000 years upon trust to raise money in aid of his personal estate for payment of debts, funeral and testamentary expenses, and legacies, and subject thereto to the Plaintiff for life, with divers remainders over. On the testator's death the Plaintiff took possession. On the expiration of the term a new tenant could not be found. The Plaintiff paid the outgoing tenant for his property in the farm, and claimed to be repaid the amount out of the testator's estate:—*Held*, that the liability to pay the outgoing tenant was a liability attaching to the land, and that the landlord for the time being was the person primarily liable; that the Plaintiff being in receipt of the rents and profits, was the landlord, and not the trustees of the term, that he therefore was the person primarily liable, and had no claim to be repaid wholly or in part either out of the testator's estate or by the persons entitled in remainder. Mansell *v.* Norton - C. A. 769

—— Distress—Bankruptcy - - - 410
See Bankruptcy. 13.

LANDS CLAUSES ACT — *Railway Company — Compulsory Powers—Entry on Land under s.* 85 *of the Lands Clauses Consolidation Act immediately before expiration of the Period allowed for Completion of Works—Right of Company to take Possession without aid of Sheriff—Minerals—Digging by Company—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 68, 85, 91—*Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 6, 77.] A railway company served a landowner with notice to treat for part of his property before the period of three years limited for the exercise of its compulsory powers had expired. The landowner served a counter-notice requiring the company to take the whole property, and nothing further was done towards ascertaining the compensation. Thirteen days before the expiration of the period of five years allowed for the completion of the works the company entered upon the land under sect. 85 of the Lands Clauses Consolidation Act, having previously made a deposit and given a bond as required by that section. After the five years had expired without the railway having been made on the land, the landowner brought his action for an injunction to restrain the company from executing works on the land and from continuing in possession of it:—*Held*, by Fry, J., that the entry of the company was lawful, and that they were entitled to retain

LANDS CLAUSES ACT—*continued.*

possession, and that the compensation must be assessed under sect. 68 of the Lands Clauses Act: *Held*, on appeal, that an entry by the company under sect. 85 at a time when it was manifest that the railway could not be made over the land before the expiration of the five years, being an entry not made for the purpose of executing the works under their statutory powers, but of acquiring a possessory title to the land against the landowner, and then making the railway under an ordinary landowner's title, was an abuse of the powers of the Act, and could confer no right upon the company after the expiration of the five years which they would not otherwise have possessed, that the company could not after the expiration of the five years take any steps against the landowner to enforce adversely the notice to treat, and that he was entitled to recover possession: *Held*, also, by Jessel, M.R., and Cotton, L.J., that if the entry under sect. 85 had been rightful, still the right of the company to possession would have ceased at the end of the five years if they had neither become owners of the land nor completed their railway upon it: *Held*, by Fry, J., that where a landowner refuses to allow a company to enter on land on which they are entitled to enter under sect. 85, but does not actually resist their entry, they are justified in entering peaceably without calling on the sheriff under sect. 91 to give them possession: *Held*, also, by Fry, J., that when an entry is made on lands under sect. 85 in pursuance of a notice to treat, which does not include minerals, if the company remove minerals which it is not necessary to remove for the purpose of constructing the railway, as, for instance, if, when the railway is to be carried on an embankment over the land of one landowner, they dig clay of merchantable value out of that land and use it in works on other land acquired by them, the landowner can maintain an action for damages for the minerals so removed, and is not limited to the remedy given by sect. 6 of the Railways Clauses Consolidation Act, 1845. Loosemore *v.* Tiverton and North Devon Railway Company - - C. A. 25

2. —— *Compulsory Purchase — Conditions Precedent—Metropolitan Street Improvements Act*, 1877 (40 *&* 41 *Vict. c. ccxxxv.*)—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 18—*Meaning of Word "take."*] By an Act of 1877, with which the Lands Clauses Act was incorporated, the Metropolitan Board of Works were authorized to effect certain street improvements, and by sect. 5 were authorized to "enter upon, take, use, and hold" any of the lands in the deposited plans and books of reference, with the exception of certain specified lands. By sect. 33, after reciting that it was expedient to make provision for the accommodation of such of the labouring classes as would be displaced by the improvements, the Board were directed to acquire or appropriate lands and sell them or let them on building lease for the purpose of the erection of suitable houses for the labouring classes. And it was provided that before the Board should, without the consent of one of the Secretaries of State, "take for the purposes of this Act" fifteen houses or more occupied at the passing of the

LANDS CLAUSES ACT—*continued.*

Act wholly or partially by persons of the labouring classes, they should prove to the satisfaction of such Secretary of State that suitable accommodation had been provided elsewhere for the same number of persons as had been accommodated in the houses to be taken. The Board served on the Plaintiff notice to treat for the purchase of more than fifteen houses belonging to him, which were occupied at the passing of the Act by the labouring classes. The Plaintiff sent in his claim without prejudice to any question as to the right of the Board to exercise their powers before complying with the proviso of sect. 33. The Board then served notice of their intention to summon a jury. It was admitted that the conditions of the proviso had not yet been complied with. The Plaintiff brought his action to restrain the Board from proceeding on their notices till they had complied with the conditions.—*Held*, by Chitty, J., that the word "take" in the proviso was not confined to taking possession, but included purchasing, and that the Board ought to be restrained from taking any steps to acquire a title to the land till they had complied with the conditions precedent. An injunction was therefore granted.—On appeal, *held*, by Jessel, M.R., and Bowen, L.J., dissentiente Cotton, L.J., that as the conditions precedent to taking the Plaintiff's land were conditions which the Board were able and compellable to comply with, the land in question was land which the Board were "authorized to purchase or take" within the meaning of the Lands Clauses Consolidation Act, 1845, sect. 18, and that they were entitled to serve a notice to treat and summon a jury.—*Held*, by Jessel, M.R., and Bowen, L.J., that the prohibition against "taking" the land till the conditions had been complied with did not prohibit the Board from taking before such compliance any proceeding prior to the conveyance, Jessel, M.R., giving no opinion whether they were prohibited from taking a conveyance or only from taking possession, and Bowen, L.J. (with whom on this point Cotton, L.J., concurred), holding that the getting a conveyance from the landlord without entering into possession came within the meaning of the word "take."—*Held*, therefore, by Jessel, M.R., and Bowen, L.J. (dissentiente Cotton, L.J.), that the injunction must be dissolved. Spencer *v.* Metropolitan Board of Works - - - - C. A. 142

3. —— *Railway Company — Lands — Easement—Right to cross Line of another Company—Lands Clauses Consolidation Act*, 1845, s. 16.] By the Act incorporating the S. Railway Company the Lands Clauses Act, 1845, except where expressly varied thereby, was incorporated therewith, and it was enacted that the words to which meanings were assigned by the Lands Clauses Act should in the special Act have the same meanings unless there was something in the subject or context repugnant thereto. The S. Company, "subject to the provisions of this Act," were empowered to purchase any of the lands in their deposited plans. By sect. 8, which was inserted for the protection of the G. W. Railway Company, it was provided (sub-sect. 1) that the S. Company should not enter upon or interfere

LANDS CLAUSES ACT—*continued.*

with or execute any work over or under the line of the G. W. Railway until plans had been approved by the engineer of the G. W. Company or an engineer appointed by the Board of Trade. Sub-sect. 2 provided that the railway of the S. Company should be carried in one place over and in another place under the G. W. Railway by a bridge and tunnel. By sub-sect. 4 the bridge and tunnel were to belong to the G. W. Company. By sub-sect. 8 the S. Company were not to interfere with the land of the G. W. Company except for the purposes of the above crossings, and it was enacted that the S. Company should not purchase or take any land of the G. W. Company, but that the S. Company might purchase and the G. W. Company should grant an easement or right of using the crossings in perpetuity. By sub-sect. 9 every dispute between the two companies respecting the above matters or any of them was to be referred to arbitration. The S. Company were proceeding to make the crossings, and the G. W. Company brought their action to restrain them from doing so, on the ground that the capital of the S. Company had not been subscribed, and that under the 16th section of the Lands Clauses Act they could not proceed to put in force any of their powers for the compulsory purchase of land until it had been subscribed:—*Held*, by Chitty, J., that, as under their Act the S. Company had the right of taking an easement over the land of the G. W. Company, the word "land" in sect. 16 of the Lands Clauses Act as incorporated in this Act must be held to include this easement, and that the S. Company must be restrained from taking steps to acquire such easement until their capital had been subscribed:—*Held*, by Jessel, M.R., and Bowen, L.J. (dissentiente Cotton, L.J.), that as the provisions of the special Act for referring disputes to arbitration provided a better means of ascertaining the compensation to be paid for crossing the line of the G. W. Company than the verdict of a jury, and the powers of the Lands Clauses Act as to compulsory purchase were therefore not necessary for the purpose of assessing the compensation, there was no necessity for giving to the word "land" in the Lands Clauses Act as incorporated with the special Act a more extensive meaning than it had in the Lands Clauses Act standing alone, which did not include a new easement, that what the S. Company were proceeding to do was therefore not a compulsory taking of land within sect. 16 of the Lands Clauses Act, and that the decision below could not be sustained. Great Western Railway Company *v.* Swindon and Cheltenham Extension Railway Company - C. A. 677

—— Investment of money in Court - 93
See Practice. 10.

LAPSE—Legacy - - - 236, 573, 663
See Will. 2, 3, 4.

LEASE—Agreement for—Condition precedent—Nominee of lessee - - - 441
See Landlord and Tenant. 1.

—— Contract for—Power of leasing - 128
See Settlement. 4.

—— Disclaimer by trustee in bankruptcy 14, 384,
See Bankruptcy. 11, 12, 13. [410

LEGACY.
See Cases under Will.

LEGATEE—Misdescription of - - 597
See Will. 10.

LETTERS—Agreement by - - - 441
See Landlord and Tenant. 1.

LIABILITY—Trustee - - 561, 727
See Trustee. 2, 3.

LIEN—Carrier—Bankruptcy—Receiver - 470
See Bankruptcy. 14.

—— Purchase-money advanced by trustee 255
See Settlement. 5.

LIMITATIONS, STATUTE OF—37 & 38 *Vict. c.* 57, *s.* 8—*Covenant in Mortgage Deed.*] The limitation of twelve years imposed by the Real Property Limitation Act, 1874, s. 8, to actions and suits for the recovery of money charged on land applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land.—The marginal notes to the sections of an Act of Parliament are not to be taken as part of the Act.—Dictum in *In re Venour's Settled Estates* (2 Ch. D. 522, 525) corrected. Sutton *v.* Sutton - - - - C. A. 511

2. —— *Mortgage Debt—Collateral Bond—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.] When a mortgage debt is secured by a collateral bond the remedy on the bond is, under sect. 8 of the Real Property Limitation Act, 1874, barred by the lapse of twelve years since the last payment of interest or acknowledgment of the debt, equally with the remedy against the land comprised in the mortgage.—*Sutton* v. *Sutton* (22 Ch. D. 511) followed. Fearnside *v.* Flint - - - - 579

3. —— *Mortgagor and Mortgagee—Executor—Devastavit.*] Testator mortgaged an estate to Plaintiffs, and devised it to three executors upon trusts in favour of his daughters, and after the death of all his children for sale.—The executors distributed the whole personal estate without providing for the mortgage debt. After this one of the executors died. The daughters occupied the farm for twenty years after the distribution of the personal estate paying rent to the executors, and until 1880 paying the interest on the mortgage. The mortgagees then brought an action for foreclosure or sale, and claimed to have any deficiency made good by the two surviving executors and the executors of the deceased executor:—*Held*, that any claim founded on the devastavit in distributing the personal estate was barred after six years, but that the Plaintiffs were entitled to foreclosure and to an order for administration of the mortgagor's estate. *In re* Gale. Blake *v.* Gale - - - - 820

4. —— *Mortgage—Satisfaction—Legal Estate—Tenancy at Will—Express Trust—3 & 4 Will. c.* 27, *ss.* 7, 25, 34—37 & 38 *Vict. c.* 57, *s.* 1.] When the money due upon a mortgage has been paid to the mortgagee, but no reconveyance has been executed, the mortgagor becomes from the date of such payment a tenant at will to the mortgagee, and the legal estate of the mortgagee is extinguished by thirteen years adverse possession of the mortgagor.—The 25th section of the Statute of Limitations (3 & 4 Will. 4, c. 27) relates to express trusts only, and does not apply to the relation between a mortgagee whose mortgage has been satisfied and the mortgagor. Sands to Thompson - - - - 614

LIQUIDATED SUM—Petitioning creditor's debt
See Bankruptcy. 2. [132

LIQUIDATION—Adjudication of bankruptcy after - - - - - 813
See Bankruptcy. 15.

LIQUIDATOR—Official—Production of documents - - - - 714
See Company. 3.

LIS ALIBI PENDENS - - - 397
See Practice. 22.

LOCAL BOARD—*Contract under Seal—Agreement to compromise—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 173, 174.] An agreement between a local board and a person against whom an action to restrain his interference with a public highway had been commenced by the local board, that the action should be settled by his paying the costs of the board (which exceeded £50), and undertaking not to build on the unbuilt land, the board agreeing not to proceed further as to pulling down the obstruction, is not a contract within the Public Health Act, 1875, necessary for carrying the Act into execution (sect. 173) so as to require to be sealed with the common seal of the local board under sect. 174; and therefore such agreement, though not under seal, is capable of being enforced by the board. Attorney-General *v.* Gaskill - - - - - 531

—— Nuisance by—Sewage - - - 221
See Nuisance.

LUNATIC—Married woman—Power of Court to elect for - - - - 263
See Settlement. 1.

—— Sale of stock—Ademption of legacy - 622
See Will. 1.

—— Trustee—Vesting order - - 535
See Trustee Acts. 2.

MAINTENANCE—Clause in settlement - 521
See Settlement. 3.

—— Infant—Accumulations - - 583
See Infant.

MANDATORY INJUNCTION—Nuisance by local board - - - - 221
See Nuisance.

MARGINAL NOTE—Act of Parliament - 511
See Limitations, Statute of. 1.

MARKET—*Statutory Market—Extinguishment of Old Franchise by Statute—Disturbance of Market.*] Under the powers of an Act of 1844, the corporation of Manchester purchased the manorial rights of the manor of Manchester, which was co-extensive with one of the six townships included in the borough. Among these rights was an ancient franchise to hold a market, which appeared to have been a Saturday market. After this, by the Manchester Market Act, 1846, the corporation were empowered to hold markets on such days as they should think fit at any places within the borough which they should appropriate as market places, and to charge any tolls not exceeding

MARKET—*continued.*
those mentioned in the schedule to the Act (which were higher than the old accustomed tolls), and to make certain charges for weighing which could not have been made under the old franchise:—*Held* (affirming the decision of the Vice-Chancellor of the county palatine of Lancaster), that there being under the Act a change of time, a change of place, an alteration of the old charges, an imposition of new charges, and an extension of the market from the township to the borough, the effect of the Act was to give the corporation new rights of holding markets in substitution for the old franchise, and that the old franchise was extinguished.—The corporation brought an action to restrain the Defendants from selling eggs and dried fish on market days in their shop. The shop was situate in a street which adjoined one side of one of the Plaintiffs' markets, and was on the opposite side of the street from, but not opposite to, the entrance from that street to the market. The Defendants only sold their own goods in their shop in the ordinary course of business:—*Held* (affirming the decision of the Vice-Chancellor), that this was no disturbance of the statutory right of market. Mayor, &c., of Manchester *v.* Lyons - - - - - C. A. 287

MARRIED WOMAN—Testamentary appointment
See Power. [238

MEMORANDUM OF ASSOCIATION - 349
See Company. 1.

MERGER—Mortgage debt—Judgment - 98
See Mortgage. 6.

MINERALS—Land taken by railway company
See Lands Clauses Act. 1. [25

MISDESCRIPTION—Legatee - - 597
See Will. 10.

MISREPRESENTATION—Agent—Sale of land
See Principal and Agent. [194

MISTAKE—Description of legatee - - 597
See Will. 10.

—— Recital in will - - - - 495
See Will. 9.

—— Time for appeal - - - 484
See Practice. 2.

MORTGAGE — *Account — Attornment Clause — Mortgagee in Possession.*] In taking the account in a foreclosure action between first mortgagee and second mortgagee and mortgagor, an attornment clause in his mortgage deed will not render the first mortgagee liable to account on the footing of mortgagee in possession in respect of the rent reserved by the attornment clause. Stanley *v.* Grundy - - - - - 478

2. —— *Contract—Mortgage to secure Moneys due from Mortgagor "his Executors, Administrators, or Assigns"—Advance to Assign—Costs of Mortgagee—Costs of Adjournment to Judge.*] W., the owner and occupier of a public-house, gave to H. & Co., brewers, a mortgage to secure £1300, and also all sums which should at any time be owing to them from W., "his executors, administrators, or assigns" on any account whatsoever. W. died giving, by will, all his property to his wife for life, without any directions as to carrying on his business. Letters of administration, with the will annexed, were granted to the widow. The

MORTGAGE—*continued.*
widow carried on the business, and was supplied with beer by H. & Co., to whom she from time to time made payments which discharged the moneys due to them from W. at his decease other than the £1300, but a balance of £138 was due from her to them at her decease for beer supplied. H. & Co. sold the property under a power of sale, and claimed to retain not only the £1300 but the £138. The question was raised on summons in an action for the administration of W.'s estate. The Chief Clerk was prepared to make an order without costs against H. & Co. to pay into Court the balance of purchase-money in their hands without deducting the £138; but H. & Co. insisted on having the case heard by the Judge. Kay, J., held that they must pay in the balance without deducting the £138, and ordered them to pay the costs of the adjournment to him as being in the nature of an unsuccessful appeal:—*Held*, on appeal, that as the widow was assign of the public-house, the £138 was covered by the security, and H. & Co. were entitled to retain it:—*Held*, also, that the adjournment to the Judge was not in the nature of an appeal, it being the right of H. & Co. to have the point heard by the Judge personally, and that even if they had been wrong on the merits they ought not to have been ordered to pay costs, for that a mortgagee cannot be deprived of costs merely because he claims bonâ fide something more than the Court holds him entitled to. In re Watts. Smith *v.* Watts [C. A. 5

3. —— *Contract—Advance to be repaid by Instalments—Stipulation for Payment of "Commission" on Instalments not duly repaid—Sale—Foreclosure—One Time for Redemption.*] A mortgagee agreed to advance to a mortgagor a sum to be repaid at specified dates by instalments, with interest at £6 per cent. per annum, and if the bank rate should exceed £4 per cent. additional interest equal to the excess. If default was made in payment of any instalment at due date there was also to be paid a "commission" of £1 per cent. for every month or part of a month from the due date to the date of payment of such instalment:—*Held*, that this "commission" was not in the nature of a penalty, and that the mortgagee was entitled to charge for it in taking the account.—Foreclosure ordered with one term of redemption for all the puisne mortgagees, as in *Bartlett* v. *Rees* (Law Rep. 12 Eq. 395).—On a security upon railway shares with power of sale, under which the shares were transferred to the lenders:—*Held*, that the lender was entitled to foreclosure, and that *Carter* v. *Wake* (4 Ch. D. 605) did not apply. General Credit and Discount Company *v.* Glegg - - - 549

4. —— *Equitable Mortgage — Foreclosure — Form of Order—Practice.*] A decree for foreclosure in the case of an equitable mortgage ought not to omit the word "foreclose," but ought to contain directions that upon default the mortgagor will be foreclosed, that the hereditaments will be discharged from all equity of redemption, and that a conveyance must be executed. Lees *v.* Fisher - - - - C. A. 283

5. —— *Foreclosure—Delivery up of Deeds—Disclaimer—Costs.*] When a judgment for fore-

MORTGAGE—*continued.*
closure is given against a puisne mortgagee, the Plaintiff is not entitled to delivery up of deeds of subsequent date to his own mortgage, dealing only with the title to the equity of redemption.—A defendant to a foreclosure action, who was originally properly made a party, is entitled to his costs incurred subsequently to his making a proper offer to disclaim.—After the commencement of a foreclosure action the solicitors of the Defendants (who were second mortgagees) wrote to the Plaintiff's solicitors, offering to consent to the dismissal of the action without costs, and to hand over a release at Plaintiff's expense. The Plaintiff brought the action to a trial, insisting that he was entitled to delivery up by the Defendants of some deeds which affected only the title to the equity of redemption:—*Held*, that the letter contained a proper offer to disclaim; that the Defendants were entitled to their costs subsequent to its date; and that the Plaintiff was not entitled to the deeds which he claimed. Greene *v.* Foster - - - - 566

6. —— *Judgment—Merger.*] By a mortgage deed the mortgagor covenanted to pay the debt on a day named, and (by a separate covenant) to pay interest at £7 per cent., so long as the £3000 or any part thereof should remain due.—The mortgagee obtained a judgment for the principal and interest due at the date of the judgment with interest at £4 per cent. on the sum made up by such principal and interest:—*Held*, that the security of the mortgage was not merged in the judgment, but that the mortgagee was entitled to sue for the difference between interest at £7 per cent. on the mortgage debt and the interest at £4 per cent. paid under the judgment. Popple *v.* Sylvester - - - - - - 98

—— Attornment clause - - 384, 410
See Bankruptcy. 12, 13.

—— Building society—Bankruptcy - 384, 450
See Bankruptcy. 12, 16.

—— Foreclosure—Defendant not appearing—Sale
See Practice. 7. [235

—— Foreclosure — Devastavit by executor of mortgagor - - - - 820
See Limitations, Statute of. 3.

—— Foreclosure—Writ of possession - 281
See Practice. 8.

—— Rates—Mortmain - - - 202
See Charity. 1.

—— Statute of Limitations—Collateral bond
See Limitations, Statute of. 2. [579

—— Statute of Limitations—Covenant - 511
See Limitations, Statute of. 1.

—— Statute of Limitations—Satisfaction 614
See Limitations, Statute of. 4.

MORTGAGEE—Goodwill—Right to trade name
See Trade-name. [660

—— In possession - - - - 478
See Mortgage. 1.

MORTMAIN - - - - - 202
See Charity. 1.

MOTION—For judgment—Report of referee 722
See Practice. 13.

MOTION—Short notice of - - - 504
See Practice. 19.

MUTUAL CREDITS - - - - 586
See Bankruptcy. 17.

NATIONALITY—Descendants of British subject born abroad - - - - 243
See Alien.

NEGLIGENCE—Trustee - - - 727
See Trustee. 3.

NEW TRUSTEE—Trustee Acts - - 633
See Trustee Act. 1.

NOTICE—Appeal—Informal - - 484
See Practice. 2.

—— Motion—Short—Irregularity - - 504
See Practice. 19.

—— Option to renew lease - - - 640
See Renewable Lease.

NUISANCE—*Drainage—Local Board—Right to send Sewage into Sewers of adjoining District—Injunction—Trivial Damage—Claim of Right—Mandatory Injunction — Stopping up existing Drains — Suspension of Injunction — Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 220—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 23.] Notwithstanding the obligation imposed on a local board by the Public Health Act, 1875, to drain their district, their right to send the sewage of their district, directly or indirectly, into the sewers belonging to the sanitary authority of an adjoining district is, in the absence of express enactment or agreement, no higher than the right of a landowner to send sewage from his land on to the land or into the drains of a neighbouring landowner.—If, therefore, a prescriptive right has been acquired to send some sewage from one district into the sewers of another, the burden cannot be increased without the consent of the sanitary authority of the latter district. The ratio decidendi of *Metropolitan Board of Works* v. *London and North Western Railway Company* (17 Ch. D. 246) applies to a local board just as it does to an ordinary landowner.—Injunction granted in the absence of proof of substantial damage, on the ground that the Defendants by their pleading claimed a right to continue doing that which the Court held they were not entitled to do.—In an action by a sanitary authority to restrain the sanitary authority of a neighbouring district from authorizing or directing sewage from their district to flow into the sewers of the Plaintiffs, the Court granted an injunction as to the future, but refused to grant a mandatory injunction to compel the stopping up of existing drains; (1), Because to do so would cause serious inconvenience to the district, and (2), Because it is doubtful whether a local board have power to stop up drains which they have once authorized to be connected with their sewers. And, inasmuch as the injunction granted applied only to the future, the Court refused to suspend its operation. Attorney-General *v.* Acton Local Board - - - - - - 221

OATH—Administration of—Commission to take evidence abroad - - - 841
See Practice. 6.

OFFICER IN ARMY—Children born abroad 243
See Alien.
OFFICIAL LIQUIDATOR—Production of documents - - - - - 714
See Company. 3.
OFFICIAL REFEREE—Report - - 722
See Practice. 13.
ONEROUS LEGACY—Disclaimer - - 573
See Will. 5.
OPTION TO RENEW LEASE - - 640
See Renewable Lease.
ORDINARY COURSE OF BUSINESS—Breach of trust - - - - - 727
See Trustee. 3.
OVERDRAWING ACCOUNT—Banker—Building society - - - - 61
See Building Society.
OUTGOING TENANT - - - 769
See Landlord and Tenant. 2.

PALACE—Ecclesiastical jurisdiction - 316
See Ecclesiastical Law.
PARTICULARS—Patent action - - 629
See Patent.

PARTITION SUIT—*Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 4—*Trust for Sale—All Cestuis que trust sui juris.*] A testator directed the trustees of his will at such times and in such manner as they should think fit to sell his copyhold estate, and to hold the proceeds in trust for his widow for life, and after his death for his children. He left six children, all of whom attained a vested interest and were sui juris.—The widow and three children brought an action for partition of the estate; the other children, who were Defendants, demurred:—*Held* (affirming the decision of Bacon, V.C.), that the trustees had a trust for sale, not a mere power; and that it was not put an end to by all the reversioners attaining a vested interest; and therefore the Court had no jurisdiction to decree a partition under the Partition Act. Biggs *v.* Peacock - C. A. 284

PARTNER—Expulsion of—Soliciting customers
See Partnership. [504

PARTNERSHIP—*Dissolution—Expulsion of Partner—Injunction to restrain expelled Partner from soliciting Customers of old Firm.*] A partner who has been expelled under a provision in the articles of partnership, and has been repaid his share of the capital, will not be restrained from carrying on the business on his own account, and soliciting the old customers of the firm.—*Walker* v. *Mottram* (19 Ch. D. 355) followed. Dawson *v.* Beeson - - - - - - 504

PATENT—*Practice—Patent Action—Interrogatories—Further Particulars—Patent Law Amendment Act*, 1852 (15 & 16 *Vict. c.* 83), *s.* 41—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125.] In a patent action where the Plaintiff or Defendant, as the case may be, makes out a proper case the Court has jurisdiction to order interrogatories to be answered notwithstanding the provision in the Patent Law Amendment Act, 1852, for the delivery of particulars.—The Plaintiff is also entitled under the 41st section of the same Act to the names and addresses of the

PATENT—*continued.*
persons by whom prior user is alleged to have been made as well as the places where the prior user has taken place. Birch *v.* Mather - 629
PAYMENT INTO COURT—Lands Clauses Act—Investment - - - - - 93
See Practice. 10.
—— Satisfaction—Acceptance - - 611
See Practice. 9.
PAYMENT OUT OF COURT—Trustee Relief Act
See Trustee Relief Act. [635
PETITION — Adjudication of bankruptcy — Amendment - - - - 529
See Bankruptcy. 5.
—— Adjudication of bankruptcy — Petitioning creditor's debt - - - - 132
See Bankruptcy. 2.
—— Order on—Res judicata - - - 182
See Practice. 15.
PLEADING—Counter-claim - - 122
See Practice. 4.
—— Reply - - - - - - 91
See Practice. 14.
PLEDGE—Shares in company—Power of pledgee
See Company. 2. [830
POSSESSION — Right to take — Railway company - - - - - 25
See Lands Clauses Act. 1.
—— Writ of - - - - - - 281
See Practice. 8.

POWER—*Married Woman—Will.*] A testatrix devising property by will by virtue of a power of appointment:—*Held*, upon the construction of the will, to have made the property her own, so that on the death of the devisee in her lifetime ths gift over in default of appointment did not take effect.—*Hoare* v. *Osborne* (12 W. R. 661; 33 L. J. (Ch.) 586) disapproved. Willoughby Osborne *v.* Holyoake - - - - - - 238

—— Appointment—Election - - 655
See Election.
—— Maintenance clause—Settlement - 521
See Settlement. 3.
—— Of leasing - - - - 128
See Settllement. 4.
—— Of sale—Pledge—Shares in company 830
See Company. 2.
—— To purchase land—Settlement - 255
See Settlement. 5.

PRACTICE — *Amendment — Embarrassing Statement of Claim—Right of Way—Rules of Court*, 1875, *Order* XXVII., *r.* 1.] In an action to restrain the obstruction of an alleged private right of way, the Plaintiff ought to shew in his statement of claim whether he claims the right by prescription or by grant.—He ought also to allege with reasonable certainty the termini of the way and its course.—If the Plaintiff omits to do this his statement of claim is embarrassing, and the Court will order it to be amended. Harris *v.* Jenkins [481

2. —— *Appeal—Time for Appeal—Informal Notice of Appeal—Letters to Solicitors of Respondent—Extension of Time—Accident or Mistake—Rules of Court*, 1875, *Order* LVIII., *rr.* 3, 15—*Costs*

PRACTICE—*continued.*

of Respondent not served with Notice of Appeal.] A petition for winding up a company having been dismissed, the Petitioner's solicitors wrote a letter to the company's solicitor urging him to get the order drawn up, adding, "as we are advised and intend to give notice of appeal." No formal notice of appeal was given till more than twenty-one days had elapsed from the dismissal of the petition, when the Petitioner gave a supplemental notice of appeal:—*Held*, that the letter could not be treated as an informal notice of appeal, and therefore the appeal was too late.—*Little's Case* (8 Ch. D. 806) considered and distinguished:—*Held*, also, that there was no such mistake or accident as would justify the Court in extending the time for appeal.—Mistake by Appellant may be a ground for extending the time for appeal, without misconduct by Respondent.—Observations of James and Baggallay, L.JJ., in *In re Blyth and Young* (13 Ch. D. 416) upon *McAndrew* v. *Barker* (7 Ch. D. 701) respecting the grounds for extension of time for appeal, approved.—An appellant ought to serve notice of appeal on all parties who will be affected by the order of the Court of Appeal, and if a party who would be so affected is not served, he may appear without service and obtain his costs. And this rule applies although the appeal fails through irregularity and never comes on to be heard. *In re* NEW CALLAO - - - - 484

3. —— *Costs—Taxation on Higher or Lower Scale—Rules of the Supreme Court (Costs), August*, 1875, *Order VI., rr.* 1, 3.] An appeal will lie from a decision by a Judge under Rules of the Supreme Court (Costs), August, 1875, Order VI., rule 3, as to the taxation of costs on the higher or lower scale; but where he has exercised his discretion the Court of Appeal will not interfere unless he has proceeded on a wrong principle or made a manifest slip.—An action for the recovery of large estates, the statement of claim in which set up a case of concealed fraud to avoid the operation of the Statutes of Limitation, was dismissed without costs. The Taxing Master in taxing the costs of the Plaintiff as between the solicitor and a person who had guaranteed their payment, taxed them on the lower scale as coming within Order VI., rule 1, and Bacon, V.C., affirmed his decision:—*Held*, that the fact of the issue of fraud being raised was not a sufficient reason for directing the costs to be taxed on the higher scale, but that, to take the case out of the general rule that the costs of an action for the recovery of land are to be taxed on the lower scale, the solicitor must shew that the case was one requiring extra skill or labour. *In re* TERRELL - C. A. 473

4. —— *Counterclaim—Set-off—Rules of Court*, 1875, *Order XIX., r.* 3.] Rule 3 of Order XIX., Rules of Court, 1875, was not intended to give rights against third parties which did not exist before; but is a rule of procedure designed to prevent the necessity of bringing a cross-action in all cases where the counter-claim may conveniently be tried in the original action. *In re* MILAN TRAMWAYS COMPANY. *Ex parte* THEYS [122

5. —— *Evidence after Decree—Right to subpœna Witness—Leave of the Court—Proceedings in Chambers*—15 & 16 *Vict. c.* 86, *ss.* 40, 41—*Rules of Court*, 1875, *Order XXXVII., r.* 4.] Any party may without leave of the Court issue a subpœna for the examination of a witness at any stage of an action; but the Court will exercise a control over this privilege to prevent its being oppressively used.—In an action for the redemption of a mortgage the usual judgment was obtained and the Defendant, the mortgagee, proceeded to vouch his accounts in Chambers. The Plaintiff subpœned a solicitor who had acted for both parties in the mortgage transactions, in order to examine him with respect to the moneys received by him on account of both parties:—*Held*, that the Plaintiff was entitled to issue the subpœna and to examine the witness. RAYMOND *v.* TAPSON [C. A. 430

6. —— *Evidence—Commission to take Evidence abroad—Single Commissioner—Administration of Oath—Rules of Supreme Court, April*, 1880, *Schedule, Form G.* 11.] When a single Commissioner is appointed to take evidence abroad the commission should authorize him to administer the oath to himself. WILSON *v.* DE COULON 841

7. —— *Judgment—Mortgage—Foreclosure—Order for Sale—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 25.] When at the trial of a foreclosure action the Plaintiff asks for a sale of the property, and the mortgagor does not appear, the Court will order an account of what is due to the Plaintiff to be first taken, and then that so much of the property be sold as will be sufficient to satisfy what is found due to the Plaintiff. WADE *v.* WILSON - - 235

8. —— *Judgment—Mortgagor—Mortgagee—Order for Foreclosure absolute—Writ of Possession—Action for Recovery of Land—Action for the Recovery of the Possession of Land—Rules of Court*, 1875, *Order XVII., r.* 2; *Order XLII., r.* 3.] An order for foreclosure absolute is not a judgment for the recovery of the possession of land within the meaning of Order XLII., rule 3, of Rules of Court, 1875.—Hence after foreclosure absolute the Plaintiff is not entitled to a writ of possession. WOOD *v.* WHEATER - - 281

9. —— *Payment into Court by Defendant in satisfaction—Acceptance—Costs of Plaintiff—Discretion of Court—Rules of Court*, 1875, *Order XXX. rr.* 1, 4—*Order LV. r.* 1.] Order XXX. applies only to an action which is strictly brought to recover a debt or damages.—If an account is claimed the order does not apply, and, even if the Plaintiff accepts in satisfaction of his whole cause of action a sum paid into Court by the Defendant, the Court has a discretion as to the costs. NICHOLS *v.* EVENS - - - - 611

10. —— *Payment into Court—Investment of Money in Court—Cash under Control of the Court—Money paid in under Lands Clauses Act*, 1845 (8 *Vict. c.* 18)—*Law of Property Act*, 1860 (23 & 24 *Vict. c.* 38), *s.* 10—*General Order, Feb.* 1, 1861.] Money paid into Court under the Lands Clauses Act is "cash under the control of the Court" within the meaning of the Act 23 & 24 Vict. c. 38, s. 10, and the General Order of the 1st of February, 1861, and may be invested in any of the securities sanctioned by the Court.—The

PRACTICE—*continued.*

expression "cash under the control of the Court" means cash standing in Court in any cause or matter.—*In re Boyd's Settled Estates* (21 W. R. 667) overruled.—Cash under the control of the Court may be invested in East India 3½ per cent. Stock created since the date of the General Order. *Ex parte* St. John Baptist College, Oxford. *In re* Metropolitan and District Railways Act - - - - - - C. A. 93

11. —— *Production of Documents—Service—Attachment—Rules of Court*, 1875, *Order xxxi., r.* 21.] In an action for the specific performance of an agreement by the Defendant to sell two leasehold houses to the Plaintiff, judgment for specific performance was given, and an order was afterwards made that the Defendant should, within four days after service of the order, produce to the Plaintiff "the abstract, and at the same time produce upon oath for inspection all deeds and writings in his possession or power" relating to the property:—*Held*, that under r. 21 of Order xxxi., service of this order on the Defendant's solicitors was sufficient service to found an application to attach the Defendant for disobedience of the order. Joy *v.* Hadley - 571

12. —— *Production of Documents—Privilege—Trustee and Cestui que Trust—Correspondence with Solicitors ante litem motam.*] In an action by cestuis que trust against their trustees to compel them to make good a breach of trust:—*Held*, that the trustees must produce letters and copies of letters from and to their solicitors in relation to matters in question in the action ante litem motam.—*Talbot* v. *Marshfield* (2 Dr. & Sm. 549) followed. *In re* Mason. Mason *v.* Cattley [609

13. —— *Referee—Report of Official Referee—Motion for Judgment—Judicature Act*, 1873, *ss.* 56, 57, 58—*Rules of Court*, 1875, *Order xxxvi., r.* 34.] In an action for an account an order was made under Order xxxiii. to take an account, without prejudice to the proceedings in the action generally being carried on. By a subsequent order it was directed that the accounts should be taken by the official referee. The referee made a report finding a sum due from the Plaintiff. The Plaintiff moved that the report might be set aside and the accounts remitted to the referee, and that he might be directed to state his reasons. The Defendant at the same time moved that the report might be confirmed and the Plaintiff ordered to pay the sum found due. Kay, J., refused both motions, holding that a motion to confirm the report was unnecessary, that the action ought to be set down for trial, and that the Plaintiff could object to the report at the hearing. The Defendant appealed:—*Held*, by the Court of Appeal, that the proper course was not to set down the action for trial, but for the Defendant to move for judgment on the report, and for the Plaintiff to move to set the report aside. Both the orders of Kay, J, were discharged, and the two motions remitted to him to be disposed of on the merits:—*Held*, also, that the proviso as to the order to take the accounts being without prejudice to the proceedings in the action generally being carried on ought not to have been inserted. Walker *v.* Bunkell - - - C. A. 722

PRACTICE—*continued.*

14. —— *Reply—Leave to deliver Reply after Time—Rules of Court*, 1875, *Order xxiv. r.* 1; *Order lvii., r.* 6.] The time for delivering a reply which would have expired on the 25th of July was extended to the 22nd of August, and then to the 19th of September. On the 26th of September no reply having been delivered the Defendant served notice of motion for judgment. On the same day the Plaintiff, by leave of the Judge, served notice of motion for the following day for leave to deliver a reply, and on the 27th the Judge refused the Plaintiff's motion on the ground of unexplained delay:—*Held*, on appeal, that the application ought to have been granted on the terms of the Plaintiff's paying the costs of it. Eaton *v.* Storer - - - C. A. 91

15. —— *Res Judicata—Order directing Payment without declaring Rights—"Until further Order"—Leave to appeal.*] Testator directed trustees to stand possessed of residuary real and personal estate upon trust to pay thereout to his wife, during her life, such an annual sum as, together with the income of a settled fund of £10,000, should produce to her "a clear annual income of £1500." He gave several legacies and annuities, and towards the end of his will declared that "no deduction shall be made from any of the legacies given by this my will, or to be given by any codicil thereto, for the legacy tax or any other matter, cause, or thing whatever."—An administration suit having been brought, an order was made in 1861 that the trustees of the will should repay to the widow certain sums which had been deducted from her annuity by mistake for succession duty, and that they should pay her until further order an annuity of £1500 free of all deductions except income tax; but no express declaration of her rights was made. This order was acted upon until 1882, when a petition was presented by the widow asking that the income tax which had been deducted might be paid to her, and that in future her annuity might be paid free of income tax:—*Held*, by the Court of Appeal, that the order of 1861 amounted to a declaration of the right of the widow to receive the annuity free of all deductions except income tax, notwithstanding the words "until further order," and that the matter was res judicata and could not now be reconsidered:—*Held*, also, that considering the lapse of time leave ought not to be given to appeal from the order. Peareth *v.* Marriott - - - - C. A. 182

16. —— *Security for Costs of Appeal—Delay in making Application—Appellant out of Jurisdiction.*] An application for security for costs of an appeal must be made promptly. As a general rule it is too late if it is made when the appeal is in the paper for hearing. But the Court will take into account special circumstances. Where a motion for security for costs and the appeal came into the paper on the same day, and it appeared that notice of appeal had been given in the Long Vacation, and that the motion for security had been delayed by reason of the Court not having sat to hear such applications on the usual day, the application was granted.—*Semble*, the Court will be more strict in enforcing promptness where the application is on the ground of

PRACTICE—*continued.*

poverty than where it is on the ground of the appellant being out of the jurisdiction. *In re* INDIAN, KINGSTON, AND SANDHURST MINING COMPANY - - - - - C. A. 83

17. —— *Sequestration — Chose in Action — Bankers.*] Where a sequestration had been issued against A.:—*Held*, that A.'s balance at his bankers might be attached under it, and that the Court had jurisdiction to order the bankers to verify and pay the balance to the sequestration account. MILLER *v.* HUDDLESTONE - 233

18. —— *Service of Writ out of Jurisdiction—Rules of Court*, 1875, *Order* XI., *r.* 1.] The old practice as to service out of the jurisdiction is no longer in force. No leave to serve a Defendant out of the jurisdiction can be given except in the cases specified in Order XI., r. 1. *In re* EAGER. EAGER *v.* JOHNSTONE - - - C. A. 86

19. —— *Short Notice of Motion—Power of Court to disregard Irregularities—Rules of Court*, 1875, *Order* LIII., *r.* 4; *Order* LIX., *r.* 1.] Where a party applies for special leave to serve short notice of motion he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party.—But in a case where short notice of a motion had been irregularly applied for and served, but the party served had not been injured by the irregularity, the Court exercised its discretion under Order LIX., rule 1, and disregarded the irregularity and heard the motion on the merits. DAWSON *v.* BEESON [C. A. 504

20. —— *Special Case—Amendment.*] In an action for the administration of the testator's estate it was ordered that a special case should be stated to obtain the opinion of the Court on the effect of the codicil. The case made it appear that the £3000 had been paid by the testator before the date of the codicil, and the declaration made by the Court of Appeal and the consequent inquiry went on this footing, and referred only to sums paid by him before the date of the codicil. A certificate was made accordingly, and the balance due from J. T. was found to be £453. The £3000 had in fact been paid by the testator after the date of the codicil, though he had been called upon for payment before. No subsequent order had been made giving effect to the certificate. The executors on discovering the error applied for leave to amend the special case, which was refused by Kay, J., on the ground of want of jurisdiction:—*Held*, by the Court of Appeal, that the special case could not be amended. But that where a special case is stated in an action, and a decision given upon it under a mistake of fact, the Court is not bound by that decision unless it has been adopted by subsequent orders, but may disregard it, direct the action to go on to trial, and direct inquiries to ascertain the real facts.—On the present occasion, the parties waiving all technical objections, and the payment of the £3000 after the date of the codicil being admitted, the Court decided that the legacy must be reduced by £3453, it not being material whether the £3000 was paid before or after the date of the codicil. *In re* TAYLOR'S ESTATE. TOMLIN *v.* UNDERHAY - - - - - 495

PRACTICE—*continued.*

21. —— *Staying Proceedings—Staying Trial of Issue of Fact pending Appeal on Question of Law—Rules of Court*, 1875, *Order* LVIII., *r.* 16.] Where a question of law has been decided on demurrer, or on a preliminary objection, and an appeal has been brought, the Court will not in general stay the trial of the issues of fact pending the appeal. *In re* J. B. PALMER'S APPLICATION. *In re* TRADE-MARKS REGISTRATION ACT, 1875 [C. A. 88

22. —— *Staying Proceedings — Two Actions in this Country—Action in Foreign Country — Lis alibi pendens.*] When a Plaintiff sues a Defendant for the same matter in two Courts in this country, such a proceeding is primâ face vexatious, and the Court will generally, as of course, put the Plaintiff to his election and stay one of the suits. And the same principle applies where one of the actions is in the Queen's Courts in Scotland or Ireland, or any other part of the Queen's dominions. Under the present practice *Lord Dillon* v. *Alvares* (4 Ves. 357) cannot be relied on as an authority.—But if one of the actions is in a foreign country where there are different forms of procedure and different remedies, there is no presumption that the multiplicity of actions is vexatious, and a special case must be made out to induce the Court to interfere. The Court has, however, power to interfere in such a case under its general jurisdiction to restrain vexatious and oppressive legislation, and will interfere in a proper case even before decree.—And *semble*, after a decree has been made in one of the actions, the Court will be more willing to exercise its jurisdiction.—*Cox* v. *Mitchell* (7 C. B. (N.S.) 55) considered. MCHENRY *v.* LEWIS [C. A. 397

—— Administration action—Costs - 101
See ADMINISTRATION ACTION. 2.

—— Evidence—Appeal - - - 312
See BANKRUPTCY. 9.

—— Costs—Interpleader—Sheriff - - 136
See BILL OF SALE.

—— Costs—Shorthand notes - - 136
See BILL OF SALE.

—— Foreclosure—Form of order - - 283
See MORTGAGE. 4.

—— Partition suit - - - - 284
See PARTITION SUIT.

—— Patent action—Interrogatories - 629
See PATENT.

—— Trustee Acts - - - 535, 633
See TRUSTEE ACTS. 1, 2.

—— Trustee Relief Act - - - 635
See TRUSTEE RELIEF ACT.

—— Winding-up—Production of documents 714
See COMPANY. 3.

PRESCRIPTIVE MARKET - - - 287
See MARKET.

PRINCIPAL AND AGENT—*Vendor and Purchaser—Misrepresentation by Vendor's Agent—Specific Performance refused.*] An agent, commissioned by a vendor to find a purchaser, has authority to describe the property, and to state any fact or circumstance which may affect the value, so as to bind the vendor; and if an agent

PRINCIPAL AND AGENT—*continued.*
so commissioned, makes a false statement as to the description or value (though not instructed so to do), which the purchaser is led to believe, and upon which he relies, the vendor cannot recover in an action for specific performance.—A surveyor was employed by the owner of a leasehold house to find a purchaser. He represented to the Defendant that another person, H., was ready to buy the property for £700, and that if the Defendant were to give £50 more, he would make a clear profit of 7 per cent.; that H. had further offered to rent the property at £300, or the ground floor only at £200. The Defendant, relying on the above representations and others, which were unauthorized by the vendor, and untrue, contracted to purchase for £750; but afterwards, finding out the falsehood, refused to complete.—The vendor himself also made a misleading statement to the purchaser:—*Held* (independently of the statement made by the vendor himself), that the false statements made by the agent, being within his authority, were sufficient to vitiate the contract; and specific performance refused. MULLENS *v.* MILLER 194
—— Statement by agent—Evidence - 593
See EVIDENCE.

PRIVILEGE—Production of documents - 609
See PRACTICE. 12.

PRODUCTION OF DOCUMENTS - 571, 609
See PRACTICE. 11, 12.

—— Winding-up—Official liquidator - 714
See COMPANY. 3.

PROFITS OF BUSINESS—Assignment of—Bankruptcy - - - - 782
See BANKRUPTCY. 6.

PROHIBITION—Ecclesiastical jurisdiction 316
See ECCLESIASTICAL LAW.

PROOF—Bankruptcy—Breach of covenant 410
See BANKRUPTCY. 13.

—— Bankruptcy—Interest—Mortgage to building society - - - - 450
See BANKRUPTCY. 16.

PUBLIC BODY—Nuisance by - - 221
See NUISANCE.

PUBLIC HEALTH ACT—Agreement to compromise - - - - 537
See LOCAL BOARD.

PURCHASE-MONEY—Advanced by trustee 255
See SETTLEMENT. 5.

PURE AND IMPURE PERSONALTY - 202
See CHARITY. 1.

QUIA TIMET ACTION—Trustee—Indemnity 561
See TRUSTEE. 2.

RAILWAY COMPANY—Lands Clauses Act 25, [677
See LANDS CLAUSES ACT. 1, 3.

RATES—Mortgage of—Mortmain - - 202
See CHARITY. 1.

RECEIVER—Appointment of—Effect on right of retainer - - - - 604
See EXECUTOR.

—— Bankruptcy - - - - 470
See BANKRUPTCY. 14

RECITAL—Mistake in—Will - - 495
See WILL. 9.

RECOVERY OF LAND—Action for—Writ of possession - - - - 281
See PRACTICE. 8.

REDEMPTION — Mortgage payable by instalments - - - - 549
See MORTGAGE. 3.

RE-ENTRY—Action to recover possession 410
See BANKRUPTCY. 13.

REFEREE—Official—Report - - 722
See PRACTICE. 13.

REGISTRATION—Bill of sale - - 136
See BILL OF SALE.

—— Resolution for composition - 773, 778
See BANKRUPTCY. 7, 8.

REHEARING—Bankruptcy - - 529
See BANKRUPTCY. 5.

RENEWABLE LEASE—*Covenant to renew Lease—Condition Precedent—Notice of Option to renew—Payment of Fine—Notice by Secretary to Company—Notice to one of Three Trustees.*] A lease of household property was granted in the year 1818 to the trustees of an insurance company for twenty-one years at a rent of £100, with a covenant that the lessor, his heirs or assigns, would from time to time, at any time before the expiration of the term, and also before the expiration of every succeeding term to be granted by every future or renewed lease, whenever required by the lessees or the persons interested in the term, or any succeeding term, and upon payment of a fine or premium of £1000, grant a renewed lease for twenty-one years, and in every such new lease there should be a similar covenant for renewal at or before the end of every twenty-one years, it being the intention of the parties that this lease should be renewable for ever at the option of the lessees, their executors, administrators, or assigns; and there was a covenant by the lessees that in case the option to renew was not exercised they would before the expiration of the term rebuild or reinstate the buildings and premises as a dwelling-house.—There were two renewals of the lease, one in 1839 and one in 1860, which last lease expired on the 24th of June, 1881. The persons then entitled under the original lessor were G. S., who was tenant for life of a moiety of the property, and three trustees, of whom G. S. was one, of the entirety subject to the life interest.—Under arrangements made by the insurance company this lease with other property was vested in five trustees upon trust to indemnify a certain class of stockholders and subject thereto for the company.—One H. was secretary to these trustees and also to the company, and it was his duty to attend to the renewal of the lease.—On the 23rd of June, 1881, G. S. gave notice to H. that the lease would expire on the following day. H. answered that the directors of the company "would of course renew the lease." Subsequently renewal was refused:—*Held*, in an action for specific performance, that it was not necessary for the lessees to pay the fine of £1000, or execute a new lease, before the expiration of the term, but that it was necessary that notice of an intention to renew should be given before the end of the term; and that the informal notice by

RENEWABLE LEASE—*continued.*
H. to G. S. was sufficient. Specific performance decreed, with payment of the premium and interest at £5 per cent. from the end of the prior lease. NICHOLSON *v.* SMITH - - - 640

RENEWAL OF REGISTRATION—Bill of sale
See BILL OF SALE. [136

REPLY—Delivery of - - - - 91
See PRACTICE. 14.

REPORT—Official referee - - - 722
See PRACTICE. 13.

RES JUDICATA—Order on petition till further order - - - - - 182
See PRACTICE. 15.

RESIDENCE—Statement of—Bill of sale - 136
See BILL OF SALE.

RESOLUTION—Composition - - 773, 778
See BANKRUPTCY. 7, 8.

RESTRICTIVE COVENANT - - - 218
See COVENANT.

RETAINER—Executor—Administration action
See EXECUTOR. [604

REVERSION—Succession duty - - 545
See SUCCESSION DUTY.

REVOCATION OF CONTRACT - - 105
See VENDOR AND PURCHASER.

ROYAL PECULIAR—Ecclesiastical jurisdiction
See ECCLESIASTICAL LAW. [316

ROYAL RESIDENCE—Ecclesiastical jurisdiction
See ECCLESIASTICAL LAW. [316

RULES OF SUPREME COURT, 1875, Order XI., r. 1 - - - - - 86
See PRACTICE. 18.

—— **Order XVII., r. 2** - - - 281
See PRACTICE. 8.

—— **Order XIX., r. 3** - - - 122
See PRACTICE. 4.

—— **Order XXIV., r. 1** - - - 91
See PRACTICE. 14.

—— **Order XXVII., r. 1** - - - 481
See PRACTICE. 1.

—— **Order XXX., rr. 1, 4** - - - 611
See PRACTICE. 9.

—— **Order XXXI., r. 21** - - - 571
See PRACTICE. 11.

—— **Order XXXVI., r. 34** - - - 722
See PRACTICE. 13.

—— **Order XXXVII., r. 4** - - - 430
See PRACTICE. 5.

—— **Order XLII., r. 3** - - - 281
See PRACTICE. 8.

—— **Order LIII., r. 4** - - - 504
See PRACTICE. 19.

—— **Order LV., r. 1** - - - - 611
See PRACTICE. 9.

—— **Order LVII., r. 6** - - - 91
See PRACTICE. 14.

—— **Order LVIII., rr. 3, 15** - - - 484
See PRACTICE. 2.

—— —— **r. 15** - - - - - 529
See BANKRUPTCY. 5.

—— —— **r. 16** - - - - - 88
See PRACTICE. 21.

RULES OF SUPREME COURT, 1875—*continued.*
—— **Order LIX., r. 1** - - - 504
See PRACTICE. 19.

RULES OF SUPREME COURT (Costs), August, 1875, Order VI., rr. 1, 3 - - 473
See PRACTICE. 3.

RULES OF SUPREME COURT, April, 1880, Schedule Form G. 11 - - - 841
See PRACTICE. 6.

SALE—Goods—Contract not to sell—Injunction
See SPECIFIC PERFORMANCE. [835

—— Order for—Mortgage—Foreclosure - 235
See PRACTICE. 7.

—— Partition suit—Trust for sale - 284
See PARTITION SUIT.

SATISFACTION—Mortgage - - 614
See LIMITATIONS, STATUTE OF. 4.

—— Payment into Court - - - 611
See PRACTICE. 9.

SCHEME—Charity—Scotch charity—Application for - - - - - 827
See CHARITY. 2.

SCOTCH CHARITY—Application for scheme 827
See CHARITY. 2.

SCOTCH SEQUESTRATION - - - 816
See BANKRUPTCY. 3.

SCOTCH WILL—Scotch assets—Administration action in England - - - 456
See ADMINISTRATION ACTION. 1.

SEAL—Contract under—Local board - 537
See LOCAL BOARD.

SECURITY—Debtor's summons - - 312
See BANKRUPTCY. 9.

SECURITY FOR COSTS - - - 83
See PRACTICE. 16.

SEPARATE ESTATE—Covenant to settle after-acquired property - - - 275
See SETTLEMENT. 2.

SEQUESTRATION - - - - - 233
See PRACTICE. 17.

—— Scotch—Subsequent bankruptcy - 816
See BANKRUPTCY. 3.

SERVICE—Attachment—Solicitor - - 571
See PRACTICE. 11.

—— Out of jurisdiction - - - 86
See PRACTICE. 18.

SET-OFF—Bankruptcy - - - 586
See BANKRUPTCY. 17.

—— Landlord and tenant—Breaches of covenant
See BANKRUPTCY. 13. [410

—— New practice - - - - - 122
See PRACTICE. 4.

—— Winding-up—Misconduct of director 122
See COMPANY. 4.

SETTLEMENT—*After-acquired Property—Wife an Infant—Separate Estate—Agreement to settle—Deed acknowledged by Wife after full age—Confirmation of Settlement—Election by Married Woman—Wife of Unsound Mind—Jurisdiction of Court to elect for.*] By a marriage settlement made in January, 1874, the wife being an infant, personal property derived under her father's marriage settlement was assigned by the husband and

SETTLEMENT—*continued.*

wife to trustees upon the usual trusts. There was a covenant by the husband that he and his wife would so soon as she should attain the age of twenty-one years convey and assign real and personal property to which she was entitled under the will of her father; and it was provided that if the wife should refuse or neglect to do so it should be lawful for the trustees to accumulate any part of the income payable to her for the other persons interested under the settlement. There was an agreement to settle the wife's after-acquired personal property. The wife, on the 13th of April, 1874, a week after she attained the age of twenty-one, and her husband executed a deed, which she acknowledged, by which she assigned all the personal property expressed to be assigned by the settlement which had not become vested in possession, and conveyed property purported to be conveyed by the settlement upon the trusts thereof.—At the date of the settlement she was contingently entitled to a reversionary interest in personal estate, but it was not actually assigned by the deed of confirmation because it did not come within the provisions of Sir R. Malins' Act, 20 & 21 Vict. c. 57. It fell into possession, and it was by the direction of the wife and her husband invested in the names of the trustees. The husband had died, and the wife had become of unsound mind, but not so found by inquisition. On summons by the infant children, by their next friend:—*Held*, following the cases of *Barrow* v. *Barrow* (4 K. & J. 409) and *Smith* v. *Lucas* (18 Ch. D. 531), that the wife could during her coverture elect to confirm the settlement, and that she had by her acts elected.—The wife having become of unsound mind, if she had not elected the Court would have made an election on her behalf, it having jurisdiction to bind the equitable interests of lunatics, not so found by inquisition, when it appears to be for their benefit.—*Jones* v. *Lloyd* (Law Rep. 18 Eq. 265) followed. Wilder *v.* Pigott - - - - - - **263**

2. —— *After-acquired Property—Will—Gift to Wife—"Separate Use."*] By an ante-nuptial settlement the husband and wife covenanted with the trustees to settle all property to which the wife then was or during the coverture she or her husband in her right should become entitled by devise, bequest, or otherwise "for any estate or interest whatsoever."—During the coverture the wife's father died, having by his will devised and bequeathed a moiety of his residuary real and personal estate to her "for her separate use, independently of any husband."—*Held*, that the moiety was bound by the covenant.—*In re Mainwaring's Settlement* (Law Rep. 2 Eq. 487) not followed. *In re* Allnutt. Pott *v.* Brassey **275**

3. —— *Maintenance Clause—Power or Trust—Direction to apply the whole or part of Income "for or towards maintenance"—Right of Father to claim Application of Income to Maintenance.*] By a marriage settlement certain personal property was settled upon trust for the wife for life, and after her death for the children; and it was declared that the trustees should after the death of the wife apply the whole or such part as the trustees should think fit of the annual income of the expectant share of any child for or towards the maintenance of such child. The trustees after the death of the wife paid the whole income of the trust fund to the husband during the infancy of the child of the marriage without exercising any discretion as to its application to his maintenance:—*Held* (affirming the decision of Bacon, V.-C.), that there was no absolute trust to apply the income to the maintenance of the children, but a discretionary trust equivalent to a power; and that as the trustees had not exercised any discretion, the estate of the husband must be held liable to repay the whole amount of the income received.—*Ransome* v. *Burgess* (Law Rep. 3 Eq. 773) disapproved.—*Mundy* v. *Earl Howe* (4 Bro. C. C. 224) commented on. Wilson *v.* Turner - - - - **C. A. 521**

4. —— *Power of leasing—Tenant for Life—Infant Remainderman — Trustees — Effectuating Predecessor's Contract for Lease.*] By a will devising real estate in strict settlement powers of granting building leases were given to any tenant for life and to trustees during the minority of any tenant in tail. The tenant for life, in pursuance of his power, entered into a contract to grant a building lease, but died without having executed a lease, and was succeeded by an infant tenant in tail:—*Held*, that the trustees had power to effectuate the contract of the tenant for life by executing a lease. Davis *v.* Harford - - - - - **128**

5. —— *Trustee—Power to purchase Land—Advance by Trustee of Part of Purchase-money—Lien.*] Under a marriage settlement the trustees were empowered at the request of the husband and wife to invest the trust fund in the purchase of real estate, and to re-sell the same. In exercise of this power the trustees, at the request of the husband and wife, bought certain real estate at a price which exceeded the whole of the trust fund, the husband promising to provide the balance out of his own moneys. The husband could not fulfil his promise, and C. P., one of the trustees, at the request of the husband and wife, borrowed the sum necessary to complete the purchase from a bank, and deposited with them the title deeds of the estate.—C. P. died, and the husband was unable to repay the loan.—In an action brought by the bank for an account and the realization of their security, and for administration of C. P.'s estate:—*Held*, that the trust estate was entitled to a first charge upon the real estate purchased for the full amount of the trust fund; that subject to such charge the estate of C. P. was entitled to be indemnified out of such real estate for the amount borrowed by him, and actually invested in or about the purchase, and to enforce such indemnity by sale of such real estate without the consent of the husband and wife: the bank being entitled to stand in the place of C. P. as against the trust estate for the amount due to them. *In re* Pumfrey, deceased. The Worcester City and County Banking Company *v.* Blick - - - - - - **255**

—— Fraudulent—13 Eliz. c. 5 - - - **74**
See Fraudulent Conveyance.

SEWAGE—Nuisance by local board - - **221**
See Nuisance.

SHARES—Indemnity against calls—Trustee 561
See TRUSTEE. 2.
—— Transfer in blank—Pledge - - 830
See COMPANY. 2.
SHERIFF—Costs of—Interpleader - 136
See BILL OF SALE.
SHORT NOTICE OF MOTION - - 504
See PRACTICE. 19.
SOLICITING CUSTOMERS—Partners - 504
See PRACTICE. 19.
SOLICITOR—Conflict of interest and duty 604
See EXECUTOR.
—— Service on—Attachment - - 571
See PRACTICE. 11.
SPECIAL CASE—Amendment - - 495
See PRACTICE. 20.
SPECIFIC LEGACY—Ademption - - 622
See WILL. 1.
—— Disclaimer of - - - - 573
See WILL. 5.
SPECIFIC PERFORMANCE—*Contract—Chattels—Injunction.*] A contract for the sale of chattels to the Plaintiff contained an express negative stipulation not to sell to any other manufacturer. The Court granted an injunction to restrain the breach of the negative stipulation although the contract was one of which specific performance would not have been granted.—*Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (Law Rep. 16 Eq. 433) considered. DONNELL *v.* BENNETT 835
—— Covenant to renew lease - - 640
See RENEWABLE LEASE.
—— Misrepresentation by vendor's agent 194
See PRINCIPAL AND AGENT.
STATEMENT OF CLAIM—Embarrassing pleading - - - - - 481
See PRACTICE. 1.
STATEMENT OF CONSIDERATION—Judgment debt—Debtor's summons - - 529
See BANKRUPTCY. 5.
STATUTES:
25 Edw. 3, stat. 1—*Naturalization* - 243
See ALIEN.
13 Eliz. c. 5—*Fraudulent Conveyances* - 74
See FRAUDULENT CONVEYANCE.
21 Jac. 1, c. 16—*Limitations* - - 820
See LIMITATIONS, STATUTE OF. 3.
7 Anne, c. 5—*Naturalization* - - 243
See ALIEN.
4 Geo. 2, c. 21, s. 1 - - - - 243
See ALIEN.
9 Geo. 2, c. 36—*Mortmain* - - 202
See CHARITY. 1.
13 Geo. 3, c. 21, s. 1—*Naturalization* - 243
See ALIEN.
3 & 4 Will. 4, c. 27, ss. 7, 25, 34—*Statute of Limitations* - - - - 614
See LIMITATIONS, STATUTE OF. 4.
1 Vict. c. 26, s. 33—*Wills* - - 663
See WILL. 4.
3 & 4 Vict. c. 86—*Church Discipline* - 316
See ECCLESIASTICAL LAW.
STATUTES—*continued.*
8 Vict. c. 18—*Lands Clauses* - - 93
See PRACTICE. 10.
—— —— s. 16 - - - - 677
See LANDS CLAUSES ACT. 3.
—— —— s. 18 - - - - 142
See LANDS CLAUSES ACT. 2.
—— —— ss. 68, 85, 91 - - - 25
See LANDS CLAUSES ACT. 1.
8 Vict. c. 20, ss. 6, 77—*Railways Clauses* 25
See LANDS CLAUSES ACT. 1.
10 & 11 Vict. c. 96, s. 2—*Trustee Relief* - 635
See TRUSTEE RELIEF ACT.
13 & 14 Vict. c. 60, s. 5—*Trustee Act* - 535
See TRUSTEE ACTS. 2.
—— —— s. 32 - - - - 633
See TRUSTEE ACTS. 1.
15 & 16 Vict. c. 80, ss. 26, 27—*Masters' Abolition* - - - - - 635
See TRUSTEE RELIEF ACT.
15 & 16 Vict. c. 83, s. 41—*Patent Law Amendment* - - - - - 629
See PATENT.
15 & 16 Vict. c. 86, ss. 40, 41—*Chancery Improvement* - - - - 430
See PRACTICE. 5.
16 & 17 Vict. c. 51, s. 10—*Succession Duty* 545
See SUCCESSION DUTY.
16 & 17 Vict. c. 70, ss. 118, 119—*Lunacy Regulation* - - - - 622
See WILL. 1.
17 & 18 Vict. c. 125—*Common Law Procedure*
See PATENT. [629
18 & 19 Vict. c. 120, ss. 135, 220—*Metropolis Local Management* - - 221
See NUISANCE.
18 & 19 Vict. c. 134, s. 16—*Despatch of Business* - - - - - 635
See TRUSTEE RELIEF ACT.
23 & 24 Vict. c. 38, s. 10—*Law of Property* 93
See PRACTICE. 10.
23 & 24 Vict. c. 145, s. 26—*Cranworth's Act*
See INFANT. [583
25 & 26 Vict. c. 89, s. 165—*Companies* 122, 714
See COMPANY. 3, 4.
31 & 32 Vict. c. 40, s. 4—*Partition* - 284
See PARTITION SUIT.
32 & 33 Vict. c. 71, s. 6—*Bankruptcy* - 132
See BANKRUPTCY. 2.
—— —— s. 6, subs. 2 - - - 788
See BANKRUPTCY. 4.
—— —— ss. 6, 10, 71 - - - 436
See BANKRUPTCY. 1.
—— —— s. 7 - - - 312, 797
See BANKRUPTCY. 9, 10.
—— —— s. 11 - - - - 782
See BANKRUPTCY. 6.
—— —— s. 12 - - - - 586
See BANKRUPTCY. 17.
—— —— s. 23 - - - 14, 384, 410
See BANKRUPTCY. 11, 12, 13.
—— —— ss. 34, 39 - - - 410
See BANKRUPTCY. 13.

STATUTES—*continued.*
32 & 33 Vict. c. 71, ss. 39, 47, 54 - 586
See Bankruptcy. 17.
—— —— s. 71 - - - - - 529
See Bankruptcy. 5.
—— —— s. 125, sub-s. 12 - - - 813
See Bankruptcy. 15.
—— —— s. 126 - - - 773, 778
See Bankruptcy. 7, 8.
36 & 37 Vict. c. 66, s. 25, sub-s. 6—*Judicature Act* - - - - - 122
See Company. 4.
—— —— ss. 56, 57, 58 - - - 722
See Practice. 13.
37 & 38 Vict. c. 57, s. 1—*Real Property Limitation* - - - - - 614
See Limitations, Statute of. 4.
—— —— s. 8 - - - 511, 579
See Limitations, Statute of. 1, 2.
38 & 39 Vict. c. 55, ss. 15, 23—*Public Health*
See Nuisance. [221
—— —— ss. 173, 174 - - - 537
See Local Board.
38 & 39 Vict. c. 77, s. 10—*Judicature Act* 586
See Bankruptcy. 17.
40 & 41 Vict. c. ccxxxv.—*Metropolitan Street Improvements* - - - 142
See Lands Clauses Act. 2.
41 & 42 Vict. c. 31, s. 11—*Bills of Sale* - 136
See Bill of Sale.
44 & 45 Vict. c. 12, ss. 27, 41—*Customs and Inland Revenue* - - - 545
See Succession Duty.
44 & 45 Vict. c. 41, s. 25—*Conveyancing and Law of Property* - - - 235
See Practice. 7.

STATUTORY MARKET - - - 287
See Market.

STAYING PROCEEDINGS - - 88, 397
See Practice. 21, 22.

STOCK—Vesting order—Standing in name of testator - - - - 535
See Trustee Acts. 2.

STOCKBROKER—Bankruptcy - - 132
See Bankruptcy. 2.
——Employment of, by trustee—Loss of fund
See Trustee. 3. [727

STOCK EXCHANGE—Defaulter—Bankruptcy petition - - - - 132
See Bankruptcy. 2.

SUCCESSION DUTY—*Duty on Letters of Administration—Cesser of Succession Duty—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 10—*Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *ss.* 27, 41.] A. died intestate and without having been married. He was entitled to an interest in reversion expectant on his father's death, in a settled fund. The father, to whom letters of administration of A.'s estate were granted, paid 3 per cent. administration duty under sect. 27 of the Customs and Inland Revenue Act, 1881, upon the estimated value of A.'s estate, including the above reversionary interest:—*Held*, that the father was exempted by sect. 41 of the same Act from paying duty at £1 per cent. in respect of A.'s succession to his father, under sect. 10 of the Succession Duty Act, 1853. *In re* Haygarth's Trusts - 545

SURVIVOR — Death of child before testator, leaving issue - - - 663
See Will. 4.

TAXATION OF COSTS—Higher or lower scale
See Practice. 3. [473

TENANT AT WILL—Mortgagor—Satisfied mortgagee - - - - 614
See Limitations, Statute of. 4.

TENANT FOR LIFE—Contract for lease - 128
See Settlement. 4.

TIME—Appeal - - - - 484
See Practice. 2.
—— Delivery of reply - - - 91
See Practice. 14.
—— Rehearing in bankruptcy - - 529
See Bankruptcy. 5.

TITLE—Defect in—Revocation of contract 105
See Vendor and Purchaser.

TRADE—Carried on by trustee - - 666
See Trustee. 1

TRADE NAME—*Mortgagee—User of Name.*] The mortgagee of stock-in-trade and goodwill, and of the right to use a name, never having used the name and not intending to use the name, cannot obtain an injunction to restrain persons claiming under the mortgagor from using the name. Beazley *v.* Soares - - - - 660

TRIVIAL DAMAGE—Nuisance by local board—Sewage - - - - 221
See Nuisance.

TRUST—For sale—Partition suit - - 284
See Partition Suit.
—— Maintenance—Settlement - - 521
See Settlement. 3.

TRUST FUND—Loss of—Broker - - 727
See Trustee. 3.

TRUSTEE—*Carrying on Business—Advances—Charges of Trustee—Right of Creditor.*] By a marriage settlement, a lunatic asylum was assigned to trustees on trust at the request of the husband and wife to sell and to stand possessed of the proceeds of the sale for the benefit of the wife and children: but the trustees were to allow the husband to carry on the business of the asylum without paying any rent, but paying certain premiums and other moneys. The husband became bankrupt, and thereupon the surviving trustee of the settlement entered into possession of the asylum, and carried on the business until the asylum was sold for a large sum of money. A tradesman had supplied the trustee with goods for the use of the asylum, and brought an action claiming payment out of the trust funds of the settlement:—*Held*, that on the construction of the settlement the trustee would not have been entitled to recover moneys advanced by him for the purposes of the asylum, and that consequently the tradesman who had no better right could not recover. Strickland *v.* Symons 666
2. —— *Cestui que Trust—Indemnity against*

TRUSTEE—*continued.*

Future Liability—Quia Timet Action—Shares in Company in Liquidation.] A trustee held shares in a company on trust for an adult cestui que trust. He had applied for them at the request of the cestui que trust, who paid the money due to the company on the application and allotment. The trustee executed a transfer of the shares to the cestui que trust, and the latter sent it to the company for registration, but the directors refused to register it, and when an order was made to wind up the company the name of the trustee remained on the company's register as the holder of the shares. No further call had been made on them. The trustee brought an action against the cestui que trust, claiming an indemnity against liability on the shares. There was no evidence to shew whether calls were likely to be made in the winding-up:—*Held*, that the action was a mere quia timet one, and that it was premature and could not be maintained.—*Lord Ranelaugh* v. *Hayes* (1 Vern. 189) not followed. HUGHES-HALLETT *v.* INDIAN MAMMOTH GOLD MINES COMPANY - - - - 561

3. —— *Loss of Trust Fund—Employment of Broker—Ordinary Course of Business—Negligence.*] A trustee is bound to conduct the business of the trust in the same way in which an ordinary prudent man of business conducts his own, and has no further obligation. He may employ brokers and agents in cases in which they are employed in the ordinary course of business.—A trustee, with the consent of his cestuis que trust, employed a broker for the investment of £15,000 of the trust funds in corporation stocks. On the day before the next settling-day the broker brought to the trustee a bought-note and obtained the £15,000 from him, on the statement that the money would have to be paid next day. The space left in the bought-note for the date of the settling-day was not filled up, and no charge was inserted for commission.—The broker never acquired the securities, but appropriated the money to his own purposes, as was discovered about a month afterwards when he became bankrupt. A few days after the payment, the trustee had inquired of the broker whether the securities were ready, and was told it would take some time to obtain them. On subsequent occasions similar excuses were given. There was evidence that about a fortnight was generally required to get corporation bonds completed when obtained direct, the broker holding in the meantime a banker's receipt for the money.—Evidence was given that the form of the bought-note would indicate to brokers, though probably not to others, that the bonds were to be procured from the corporation direct:—*Held* (reversing the judgment of Bacon, V.C.), that the trustee having acted in the ordinary course of business was not liable to make good the loss occasioned by the embezzlement of the trust moneys by the broker.—Whether the trustee would have been justified in paying the money to the broker if he had had notice that the bonds were to be procured direct from the corporation—*Quære.*—*Bostock* v. *Floyer* (Law Rep. 1 Eq. 26) explained.—*Hopgood* v. *Parkin* (Law Rep. 11 Eq. 74) questioned. *In re* SPEIGHT. SPEIGHT *v.* GAUNT - - C. A. 727

TRUSTEE—*continued.*

—— "Incapable to act"—Appointment of new trustee - - - - - 633
See TRUSTEE ACTS. 1.

—— Notice to one trustee - - - 640
See RENEWABLE LEASE.

—— Power of leasing—Contract by tenant for life - - - - - 128
See SETTLEMENT. 4.

—— Power to purchase land—Lien for purchase-money - - - 255
See SETTLEMENT. 5.

TRUSTEE IN BANKRUPTCY—Costs and charges of - - - - - 436
See BANKRUPTCY. 1

—— Disclaimer - - - 14, 384, 410
See BANKRUPTCY. 11, 12, 13.

—— Relation back of title - - - 782
See BANKRUPTCY. 6.

TRUSTEE ACTS—*Trustee*—"*Incapable to act*"—*Personal Incapacity—Appointment of new Trustee*—"*Expedient*"—*Trustee Act*, 1850, *s.* 32.] The Court has jurisdiction, under s. 32 of the Trustee Act, 1850, to appoint a new trustee in the place of a trustee who has become incapable—as, for instance, through age and infirmity—of acting in the trusts.—A will contained a power for the trustees or the survivors of them to appoint a new trustee in the place of any trustee who should be "incapable to act." One of the surviving trustees, the testator's widow, having become, through age and infirmity, incapable of acting in the trusts, or of concurring in the appointment of a new trustee, or in a transfer of the trust estate:—The Court appointed a new trustee in her place and made a vesting order. *In re* LEMANN'S TRUSTS [633

2. —— *Stock standing in the Name of Testator—One of several Executors a Lunatic—Trustee Act*, 1850, *s.* 5.] Where one of three executors of the surviving executor of a testator was of unsound mind an order was made under the 5th section of the Trustee Act, 1850, giving the right to transfer a sum of stock belonging to the estate of the original testator, although the stock still remained standing in the name of the original testator. *In re* WACHER - - C. A. 535

TRUSTEE RELIEF ACT—*Petition—Payment out of Court—Adjournment into Chambers—Jurisdiction—Trustee Relief Act*, 1847 (10 & 11 *Vict. c.* 96), *s.* 2—*Masters Abolition Act*, 1852 (15 & 16 *Vict. c.* 80), *ss.* 26, 27—*Despatch of Business Act*, 1855 (18 & 19 *Vict. c.* 134), *s.* 16—*Cons. Ord. XXXV. r.* 1.] A trust fund having been paid into Court under the Trustee Relief Act by the trustee of a will, a petition was presented by parties interested for an inquiry as to the persons entitled and for payment out to the persons found entitled under that inquiry. Upon the petition coming on for hearing an order was made directing the inquiry, and adjourning the further hearing of the petition into Chambers:—*Held*, that the proceeding having been properly commenced by petition under s. 2 of the Trustee Relief Act, the Court had jurisdiction, under s. 27 of the Masters Abolition Act, 1852 (15 & 16 Vict. c. 80), to adjourn the petition into Chambers.—*Frodsham* v. *Frod-*

TRUSTEE RELIEF ACT—*continued.*
sham (15 Ch. D. 317) distinguished. *In re* Moate's Trust - - - - - - 635

ULTRÀ VIRES ACT—Building society—Overdrawing banker's account - - 61
See Building Society.

UNDISCHARGED BANKRUPT - - 586
See Bankruptcy. 17.

UNSOUND MIND—Person of—Power of Court to elect for - - - - 263
See Settlement. 1.

USER OF TRADE NAME - - - 660
See Trade Name.

VALUATION—Crops—Incoming tenant - 769
See Landlord and Tenant. 2.

VARIANCE BETWEEN ARTICLES AND MEMORANDUM - - - - 349
See Company. 1.

VENDOR AND PURCHASER—*Title—Defect—Repudiation of Contract.*] A vendor contracted to sell and a purchaser to purchase an agreement for a lease. The purchaser afterwards repudiated the contract.—At the date of the agreement, and of the repudiation, the agreement to lease was voidable at the will of a third party, but the third party took no steps to avoid the agreement, but was willing to confirm it on certain conditions:—*Held*, that the purchaser was entitled to repudiate the contract. Brewer *v.* Broadwood - 105

—— Misrepresentation by vendor's agent 194
See Principal and Agent.

VESTING ORDER - - - - - 535
See Trustee Acts. 2.

WAY—Pleading—Statement of course and termini - - - - - - 481
See Practice. 6.

WESTMINSTER, PALACE OF—Ecclesiastical jurisdiction - - - - 316
See Ecclesiastical Law.

WIFE—Invalid marriage—Legacy to widow 597
See Will. 10.

WILL—*Ademption—Lunatic Testator—Lunacy Jurisdiction—Specific Bequest—Order for Sale—Separate Account—Ademption—Lunacy Regulation Act*, 1853 (16 & 17 *Vict. c.* 70), *ss.* 118, 119.] A testator made a specific bequest of stock in the G. railway company. After the date of his will he was found a lunatic. Under an order in the lunacy, the stock was sold and the proceeds were invested in a sum of consols, which was carried to the credit of the lunatic to an account intituled "Proceeds of the sale of stock in the G. railway company."—In an action for the administration of the testator's estate:—*Held*, that the specific legacy was adeemed by the sale in the lunacy, and that the consols therefore fell into the residue.—Observations on *Jones* v. *Green* (Law Rep. 5 Eq. 555), and *In re Leeming* (3 D. F. & J. 43). *In re* Freer. Freer *v.* Freer - - 622

2. —— *Class—Gift of Residue unto and equally amongst all the Children of J. D. and R. A. to be vested Legacies at Testator's Death—Death of R. A. before Testator—Children of R. A. not entitled—Residuary Legatee living at Death entitled.*] Testator gave to trustees all his estates upon trust to sell, and directed that the proceeds of sale should be part of his personal estate and be subject to the dispositions concerning his residuary estate, and after giving legacies—one to R. A., and another to the children of J. D.—he gave the residue unto and equally amongst all the children of his brother-in-law, J. D., and the said R. A., and directed that the same should be vested legacies at the time of his decease. R. A. died before the testator, leaving children living at the testator's death. Three children of J. D. were living at the testator's death:—*Held*, that R. A. would, if living, have taken a share of the residue and not his children, and that, as he died before the testator, the share which he would have taken belonged to the three surviving residuary legatees, not as a class with R. A., but under the special terms of this will. *In re* Featherstone's Trusts - - - 111

3. —— "*Death*"—*Gift over.*] A testator left legacies to three persons, and if any of them died their share was to go to the others. One of the legatees and the testator died at the same instant:—*Held*, that "death" must, according to the ordinary rule, mean death in the testator's lifetime, and that the legacy of the legatee so dying became part of the residue. Elliott *v.* Smith [236

4. —— *Death before Testator—Bequest to Daughter to be subject if she survived Testator to the Trusts of her Settlement—Death of Daughter in Testator's Lifetime leaving Issue living at his Death—Wills Act* (1 *Vict. c.* 26), *s.* 33.] A testator gave his residuary personal estate to his children in equal shares, and directed that the share of his daughter, Mrs. B., if she survived him, should be subject to the trusts of her marriage settlement and paid to the trustees thereof. Mrs. B. died in the testator's lifetime, but left children surviving him. Her husband having taken out administration to her he claimed her share:—*Held*, that under sect. 33 of the Wills Act (1 Vict. c. 26), Mrs. B. must for all the purposes of the will be taken to have survived the testator, and that the share must be paid to the trustees of the marriage settlement and not the administrator. *In re* Hone's Trusts - - - - 663

5. —— *Disclaimer—Debt—Locality—Domicil—Onerous Legacy—Right of Legatee to disclaim—Contingent Specific Legacy—Right to Income before happening of Contingency.*] A testator resident in England at the time of his death bequeathed to his son "all his estate and effects in Mauritius." At the time of his death the purchase-money of real estate in Mauritius sold by him to persons residing in that island was due to him. He was not domiciled in Mauritius:—*Held*, that this debt was included in the bequest of his property in Mauritius.—When by a will two distinct legacies are bequeathed to the same person, one of them being onerous and the other beneficial, primâ facie the legatee is entitled to disclaim the onerous legacy and to take the other.—If, however, onerous property and beneficial property are included in the same gift, primâ facie

WILL—*continued.*

the legatee cannot disclaim the onerous and accept the beneficial; he must take the whole gift or none of it.—But this primâ facie rule may be rebutted if the will manifests a sufficient intention of the testator to the contrary.—*Green* v. *Britten* (42 L. J. (Ch.) 187) followed.—The interim income subject to the interim burden of a contingent specific legacy until the happening of the contingency falls into the residue of the testator's estate, or goes to his next of kin, as the case may be. GUTHRIE *v.* WALROND - - - 573

6. —— "*Husband*"—*Divorce.*] A testator devised property to his daughter for life, and after her death in trust for "any husband with whom she might intermarry, if he should survive her, for his life."—The daughter married the Defendant, and was divorced from him on his petition, and he married again and survived her:—*Held*, that the Defendant was entitled to the property devised for his life. BULLMORE *v.* WYNTER - - - - - - 619

7. —— *Income Tax—Annuity—Trustees to pay Wife "clear yearly sum"—"Free from all deductions and abatements whatsoever"—Annuitant to pay Income Tax.*] Testator declared that his trustees should stand possessed of his residuary estate and directed them out of the income to pay to his wife "the clear yearly sum of £600" for life if she should remain his widow, but if she should marry again an annuity of £100 in lieu of the annuity of £600, "the said annuities of £600 and £100, as the case may be, to be paid free from all deductions and abatements whatsoever." By a codicil an annuity of £1000 was given in lieu of £600:—*Held*, that the annuity was not given free from income tax. GLEADOW *v.* LEETHAM [269

8. —— *Income Tax—Payment to be made "clear" and without "Deduction for the legacy tax, or any other matter, cause, or thing whatever"—Annuity held free of Income Tax.*] Testator directed trustees to stand possessed of residuary real and personal estate upon trust to pay thereout to his wife, during her life, such an annual sum as, together with the income of a settled fund of £10,000, should produce to her "a clear annual income of £1500." He gave several legacies and annuities, and towards the end of his will declared that "no deduction shall be made from any of the legacies given by this my will, or to be given by any codicil thereto, for the legacy tax or any other matter, cause, or thing whatever."—An administration suit having been brought, an order was made in 1861 that the trustees of the will should repay to the widow certain sums which had been deducted from her annuity by mistake for succession duty, and that they should pay her until further order an annuity of £1500 free of all deductions except income tax: but no express declaration of her rights was made. This order was acted upon until 1882, when a petition was presented by the widow asking that the income tax which had been deducted might be paid to her, and that in future her annuity might be paid free of income tax:—*Held*, by Bacon, V.C., that the widow was entitled to receive from the trustees a clear annuity of £1500, without any deduction

WILL—*continued.*

therefrom on account of income tax:—But *held*, by the Court of Appeal, discharging the order of Bacon, V.C., that the order of 1861 amounted to a declaration of the right of the widow to receive the annuity free of all deductions except income tax, notwithstanding the words "until further order," and that the matter was res judicata and could not now be reconsidered.—*Quære*, whether, if the matter had not been res judicata, the decision of the Vice-Chancellor was correct. PEARETH *v.* MARRIOTT - - - - - - 182

9. —— *Mistake—Erroneous Statement of Fact.*] A testator gave a legacy of £7000 in trust for his daughter, the wife of J. T., and her children, and after reciting that he had given a bond for £3000 for J. T., he directed that what should remain due on the bond at his death should be paid out of the legacy. By a codicil made about a year afterwards he recited that he had paid the £3000 and other sums for which he was bound for J. T. to an amount exceeding £5000 in the whole, and directed that if J. T. should not before his death have repaid to him £5000 at least, the sum of £5000 should be taken in part payment of the £7000, and to that extent he revoked the legacy: It was admitted that J. T. had not repaid the £5000, but the legatees disputed the fact that the testator had paid so much as £5000 for J. T.:—*Held*, by Hall, V.C., that the legacy must be reduced by £5000, for that the legatees could not dispute the statements made by the testator as to the payments made by him.—*Held*, by the Court of Appeal that the legacy must be reduced only by the amount remaining unrepaid of sums advanced by the testator for J. T., and that an account must be directed.—*In re Aird's Estate* (12 Ch. D. 291) not followed. *In re* TAYLOR'S ESTATE. TOMLIN *v.* UNDERHAY - C. A. 495

10. —— *Misdescription of Legatee—Legacy given for particular Purpose—Gift of Annuity to Wife during Widowhood—Invalid Marriage.*] A testator by his will gave the proceeds of sale of his residuary estate to trustees, on trust to pay to his wife E. C., within one month after his decease, a legacy of £200, and in addition thereto to pay to his said wife, "so long as she shall continue my widow and unmarried," an annuity of £300, commencing from the date of his decease, "or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of £2000. And I direct that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my estate."—After the date of the will the marriage was, in a suit in the Divorce Court instituted by the wife, declared void ab initio, on the ground of the impotency of the testator. He died without altering his will:—*Held*, that the late wife was entitled to the legacy of £200, but that she could not claim the annuity inasmuch as she, never having been in law the wife of the testator, never could be or continue his widow, and the annuity was therefore given for a period which could never come into existence:—*Held*, also, that she could not take the £2000 which was given in substitution for the annuity to which she was not entitled.—Observations on *Rishton* v.

WILL—*continued.*
Cobb (5 My. & Cr. 145). *In re* Boddington.
Boddington *v.* Clariat - - - 597
——Charity—Mortmain - - - - 202
See Charity. 1.
——Election - - - - - 655
See Election.
——Married woman—Testamentary appointment - - - - - 238
See Power.
WINDING-UP - - - 122, 714
See Company. 3, 4.
WITNESS—Right to subpœna—Leave of Court
See Practice. 5. [430
WORDS—"Clear of deduction" - - 182
See Will. 8.
——"Clear yearly sums, free of all deductions"
See Will. 7. [269
WORDS—*continued.*
——"Death" - - - - 236
See Will. 3.
——"Estate and effects" - - - 573
See Will. 5.
——"Expedient" - - - - 633
See Trustee Acts. 1.
——"Husband" - - - - 619
See Will. 6.
——"Incapable to act" - - - 633
See Trustee Acts. 1.
——"Take" - - - - - 142
See Lands Clauses Act. 2.
——"Until further order" - - - 182
See Practice. 15.
WRIT—Of possession - - - 281
See Practice. 8.
——Service out of jurisdiction - - 86
See Practice. 18.

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